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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 32

THE GOVERNMENT OF PUERTO RICO,
Petitioner,
v.
THE SECRETARY OF AGRICULTURE, THE AMERICAN SUGAR REFINING CO., ET AL.,
Respondents,
and
No. 27
SECRETARY OF AGRICULTURE,
Petitioner,
v.
THE GOVERNMENT OF PUERTO RICO, CENTRAL ROIG REFINING COMPANY, WESTERN SUGAR REFINING COMPANY, ET AL.,
Respondents.

BRIEF FOR THE GOVERNMENT OF PUERTO RICO, PETITIONER IN NO. 32, RESPONDENT IN NO. 27.

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BRIEF FOR THE GOVERNMENT OF PUERTO RICO, PETITIONER IN NO. 32, RESPONDENT IN NO. 27.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Government of Puerto Rico, a party to the proceedings below by reason of its interest and its intervention, appears before this Court in accordance with its petition for certiorari, granted the 26th of April, 1949. It seeks a review of the refusal of the United States Court of Appeals for the District of Columbia Circuit to consider the validity of Section 207(b) of the Sugar Act of 1948 and to decree the larger and more permanent relief there asked

for in the cause of *Central Roig Refining Company and Western Sugar Refining Company* v. *Secretary of Agriculture*, decided the 24th of November, 1948. Petitioner professes no interest in, and no concern with, the narrow statutory question upon which the Secretary of Agriculture[1] has sought—and been accorded—a review of the judgment below. In accordance with its interest, the Government of Puerto Rico is seeking a review in respect to the constitutional question which, although "fully argued" as the opinion admits, the court below refused to decide. And, in support of this, its prayer for an authoritative answer to the constitutional question presented by this case, the Government of Puerto Rico submits this its brief.

I. FORMAL REQUISITES OF THE SUIT.

A. Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia Circuit delivered on November 24, 1948, is to be found in 171 F. (2d) 1016.

B. Jurisdiction.

The jurisdiction of this Court is invoked under Section 347, 28 U. S. C. A., as amended, in defense of rights established by the Constitution of the United States and extended to the people of Puerto Rico by the Act of Congress of March 2, 1917, as amended, known as the Organic Act.[1a] It is invoked against Section 207(b) of the Sugar Act of 1948,[1b] which is not authorized by the Constitution and which is repugnant to many of its provisions including among others Article I, sections 8 and 9, Article II, section 3, and the Fifth Amendment.

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[1] Hereafter referred to as the Secretary.

[1a] The relevant sections of the Organic Act of Puerto Rico are to be found in Appendix D.

[1b] The relevant sections of the Sugar Act of 1948 are to be found in Appendix C.

C. The Accused Order.

The order of the Secretary which the court below was called upon to review; and after due notice and proper hearing did reverse, is the Decision and Order of the Secretary of Agriculture Allotting Direct Consumption Portion of 1948 Sugar Quota for Puerto Rico, commonly referred to as Puerto Rico Sugar Order No. 18, and is to be found in 13 F. R. 310; filed January 21, 1948 (R. 160-175).[2]

D. Statutes Involved.

In addition to the Constitution of the United States, the statutes principally involved in the instant case are the Organic Act of March 2, 1917, as amended, establishing the present civil government in Puerto Rico and sections 101, 201, 205 and 207 of the Sugar Act of 1948 (Pub. Law No. 388, 80th Cong., 1st Sess., ch. 519, Aug. 8, 1947).[3]

E. Standing to Sue.

We take it that the issue of the standing of the Government of Puerto Rico[4] to maintain this action, and its justifiable interest in the outcome of this litigation, is not in serious issue. For the following reasons the right of Puerto Rico to be heard, by brief and on oral argument, seems to rest upon solid ground and to be beyond legal challenge.

1. In the proceeding below, instituted by the Central Roig and Western Sugar Refining Companies, the Government of Puerto Rico sought—and was granted—permission to intervene under Section 38(c) (Title VIII, Administrative Agencies Generally) of the Rules of the United States Court of Appeals for the District of Columbia Circuit. A certified copy of the order of the court below to that effect, dated

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[2] Hereafter referred to as the Order.

[3] Unless otherwise specified, the word Act refers to the Sugar Act of 1948.

[4] In respect to petitioner, we use the term which is commonly employed and which was used in the court below. It is of note, however, that the technical term for "the body politic" is the People of Puerto Rico. First Organic Act, 31 Stat. 77 (1900), C. 191, Sec. 7.

June 6, 1948, is on file with the Clerk of this Court, and is reproduced as Appendix A to this brief.

In the court below, the American Sugar Refining Company, and the nine other Coast Refiners,[5] acting in concert and through a single attorney, alone among the parties in interest, sought by motion properly made, to exclude the Government of Puerto Rico from the case. The matter was thoroughly explored in briefs submitted by the adverse parties. The applicable principles of law were there presented; the authorities were expounded; the relevant cases—and a host of irrelevant ones—were cited by the Coast Refiners and dissected by your petitioner. All the arguments of the Coast Refiners, elaborately presented and vigorously maintained, were rejected by the court below.

2. In an answer to the petition for a writ of certiorari asked for from this Court by the Government of Puerto Rico, the Coast Refiners again insisted in a brief in opposition[6] that your petitioner was without "justiciable interest . . . ". In the face of this protest, the petition of the Government of Puerto Rico was granted; and its cause of action, isolated from other petitioners for certiorari, was with a separate number assigned to the summary docket for argument immediately following the causes, whose initial concern is with the statutory question (October Term, 1949, Nos. 27 and 30).

It is of note that respondents, the Coast Refiners, have made no motion in this Court either to reverse the order of the court below recognizing your petitioner's interest and admitting it as a party to the case, or to have this Court dismiss the instant action because of a want of a justiciable interest by the Government of Puerto Rico.

3. The legal authorities presented by the Coast Refiners do not support the contentions which they have twice put forward. In view of the fact that no motion to exclude your petitioner from the case is before the Court, it seems

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[5] Hereafter referred to as the Coast Refiners.

[6] Brief for the American Sugar Refining Co., et al., in Opposition (October Term, 1948, Nos. 575, 580, 585), 14-15.

unnecessary to burden the text of this brief with an exhaustive critical survey of the cases, such as was presented to the court below. It is enough in Appendix B, which by reference is made a part of this brief, in summary fashion to review the authorities.

4. In the instant case the raising of the constitutional issue is in no wise contingent upon the standing to sue of the Government of Puerto Rico or upon its justiciable interest. That issue was in the case while the Secretary was concerned with his Order. It was in the case before—in fact its presence was the occasion for—the intervention of the Government of Puerto Rico. That issue, in their own behalf, was raised by Central Roig and by Western, which companies intend to press it in the instant series of cases.

5. The Government of Puerto Rico, in its petition—granted by the court below—sought "to intervene and to become a party . . . in a dual capacity:"

(a) "In its governmental capacity by virtue of which it is lawfully charged with the obligation of formulating and executing public policy directed to the development of the resources of Puerto Rico, with the advancement of the agriculture, industry and commerce of the island" and "with the linkage of the insular with the continental economy of the United States . . . "

(b) "In its lawfully recognized capacity as *parens patriae* to the people of Puerto Rico as an organized society, whose opportunities for employment and investment of capital, the extent of whose markets outside the island and whose standards of life and material welfare are all substantially affected . . . by a Decision and Order which accepts as valid Section 207(b) of the Act . . . "[7]

Moreover, the Government of Puerto Rico sought—and won—the right to intervene, not only in behalf of itself, but also in behalf of "the people of Puerto Rico, the Planning Board, the Agricultural Company, the Industrial Develop-

[7] Statement of Interest by the Government of Puerto Rico, filed with the court below (U. S. Ct. of Appeals, D. C., No. 9769), 4.

ment Company, the Office of Puerto Rico in Washington, and the various other departments, agencies, corporations and independent establishments through which the functions of state are lawfully performed."[8]

Standing has meaning only in terms of the capacity[9] in which the suitor appears. To deny standing, it would have to be shown that neither in its sovereign capacity[10] nor as *parens patriae* has the Government of Puerto Rico any justiciable interest in the instant controversy. Even if that were done, the fact that the Government operates through a number of corporate bodies would have to be met, and it would have to be shown that they possessed no justiciable interests in the instant cause of action.

6. The Government of Puerto Rico—as well as the various agencies through which it operates—will be bound by the decision of the Court in the instant case. Its interest is different from, and larger than, that of any of the private parties to the action. It will by the judgment of the Court be affected in ways and to an extent which it is not to the interest of private parties to explore. It is a requisite to a wise decision that the Court have before it all that is pertinent to the legal issue raised.

7. To deny to the Government of Puerto Rico standing in the instant case would leave it helpless in the face of the hazard to its body politic, the development of its economy, and the advancement of the welfare of its people inherent in the alleged power of Congress to pass such legislation as is represented by the accused section. For:

(a) In respect to all such matters Puerto Rico has no access to the federal political process. Its two and a quarter million people possess no Senators or Representatives. In the Congress the territory has only a Resident Com-

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[8] Ibid., 3-4.

[9] In the instant case, despite the fact that it owns a number of centrals and would like to refine the sugar grown upon them, the Government of Puerto Rico does not appear in its proprietary capacity.

[10] The Government of Puerto Rico is a sovereign, and has the status of a state in the Union, in that it cannot be sued without its own consent. *People of Porto Rico* v. *Manuel Rosaly y Castillo*, 227 U. S. 270; 33 S. Ct. 352.

missioner, who by the courtesy of that body—there is no law on the subject—is indulged a seat in the House of Representatives but has no vote.

(b) As a body politic within the federal system, the interests of the Government and the People of Puerto Rico might be represented by the United States through the Solicitor General. But, at least in recent years, the Government of Puerto Rico has been left by the federal authorities to handle its own litigation; and that arrangement has grown into established usage. More important, in the instant case, the Solicitor General appears for the adverse party, the Secretary of Agriculture.

Accordingly to deny Puerto Rico standing is to rule that a body politic, under an organized civil government and possessing an accredited status within our federal system, is utterly without administrative, legislative, or judicial remedy.

II. STATEMENT OF THE MATTER AT ISSUE.

The instant case presents two overlapping yet distinct questions. The first is the validity of the Decree and Order of the Secretary. The second is the validity of Section 207(b) of the Act upon which the Order and Decree are predicated. Sugar Order No. 18 and Section 207(b),[11] in legal challenge in the instant case, are technical in character and the justiciable issues which they present are to be understood only against the background of raw sugar, an industry in distress.

For many years the imposition of order and justice upon the raw sugar industry was left to the open market. The various sources of supply were widely scattered. The product extracted from cane and beets grown within the continental United States was insufficient to meet the demand. The great bulk of sugar essential to the nation's needs was purchased in the world market. In respect to

[11] Hereafter referred to either as the accused section or as Section 207(b).

raw sugar the market, giving play to competitive forces, failed in its regulatory office. Tropical growth and the one-crop system conspired to keep supply continuously in excess of a slowly increasing demand. Price was depressed below the cost of production. The growers were too numerous and too distant from each other either to adjust acreage to the ups and downs of price or through collective action to attack the sources of disorder. A competition out of hand resulted in a continuous plague of bankruptcies among the growers and for the workers in a standard of life depressed far below the level of decency.

At last the Government was called upon to take over the regulatory office of the market. The first Agricultural Adjustment Act [12] was directed towards bringing order to the production of the domestic staple crops, in which capacity to produce had outrun market demand. Unlike corn, wheat and cotton, the domestic supply of sugar was inadequate, and there is no mention of it in the Act. But, over the territory extending beyond the continent, from which supplies had to be drawn, the growing of sugar presented a like pattern of disorder and a like call for farm relief. Accordingly in the Jones-Costigan Act of 1934 [13]—set down as an "amendment" to the first Agricultural Adjustment Act—the Congress adapted the current pattern of farm relief to the circumstances of sugar. The legislative intent was to lift the territories from which the continental United States draws its sugar supply to a "plateau" and there to insulate raw sugar against the forces which had brought havoc to the world market. The rationale of this Act was to replace the open market with an administrative control in order that health might be brought to an industry in distress. The Jones-Costigan Act was superseded by the Sugar Act of 1937 [14] which in turn gave way to the Sugar Act of 1948.[15]

Thus in the Sugar Act of 1948 a pattern is imposed upon

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[12] 7 U. S. C. A. 601.
[13] May 9, 1934, C. 263, 48 Stat. 670, Title 7, Section 611.
[14] Sept. 1, 1937, C. 898, 50 Stat. 903; Title 7, 1100-1183.
[15] Aug. 8, 1947, C. 519, Par. 1, 61 Stat. 922; Title 7, Section 1100.

the growing of sugar. For technical reasons, in recognition that principal sources of supply are under foreign flags and because of an important decision of this Court,[16] the Act was written in terms of the number of tons of sugar which annually each supplying territory was permitted to market on the mainland. To that end the Secretary was instructed to determine for each year the total needs of the continental United States for household and industrial consumption. (Act, Section 201.) In accordance with what was right and fair, the total so ascertained was to be broken down and substantial quotas were to be assigned to Cuba, Hawaii, Puerto Rico, the Virgin Islands, the Republic of the Philippine Islands, as well as to the cane and the beet growing regions on the mainland. A small quota was assigned to the rest of the world.

In framing a statute addressed to the plight of raw sugar, the Congress kept the public interest to the front. A sufficient amount of sugar was permitted entrance to meet all domestic demands. No industry or person was to go without. For each of the sugar supplying territories—whether continental or off-shore—access to the mainland market was limited; and each, in lieu of competing for this market, had a quota assigned to it. The restriction has not been severe. The quotas assigned to the cane and beet regions on the mainland and to Hawaii have never been below capacity. In fact no one of these three territories has ever succeeded in filling its quota. Although it could produce at least 200,000 tons more the quota assigned to Puerto Rice has not been outrageously unfair. In the Act, Cuba, a foreign country—which alone can supply all our continental demands—is called upon to give flexibility to the system of control. In effect its variable quota makes up the deficit between our continental needs and the supples available from American territories. Relief from a chaotic con-

[16] In *U. S.* v. *Butler*, 297 U. S. 1, 56 S. Ct. 312, the declaration of the invalidity of the first Agricultural Adjustment Act made necessary the rewriting of its amendment. Hence the Jones-Costigan Act was superseded by the Sugar Act of 1937.

dition has been brought about by a market quota system which in effect imposes a pattern of regulation upon the continental market. As a result the price of sugar has been stabilized at a level high enough to cover necessary costs; economic security has been established for the industry; the standard of life of the workers in the cane and beet fields—alike on the mainland and off-shore—has been substantially advanced. In general, as respects the growing of sugar, the Act has realized the intent which prompted it.

The task of Congress was finished in setting up the system of regulation for raw sugar. In no other farm-relief act has the Congress gone on to impose restrictions, or even a system of regulation, upon the processing of the product.[17] But, in its concern with sugar, the Congress proceeded to graft upon the Act certain alien provisions in respect to refined. In spite of the facts that the source of disorder lay at the farm level, that by the regulation of raw supply had been equated to demand and that accordingly the business of refining could safely be left to the open market, it ventured where there was no legislative need. It did not, however, follow its pattern for raw and establish a system of allocation for refined sugar. It assigned no quotas to the several territories for the processing or marketing of refined. Instead, the Congress in specific terms decreed maxima for the "portions of the marketing quotas" assigned to the several off-shore territories which could be filled with "direct-consumption sugar". Thus, of the 910,000 short tons of sugar raw value which annually Puerto Rico was permitted to market in the continental United States, not more than 126,033 tons were to be imported in refined form. Similar restrictions were set against all the off-shore territories except the Virgin Islands which was

[17] In the first Agricultural Adjustment Act, the Congress did employ the processor, as the most convenient point for the exercise of control. And the processor was forbidden to process the staple commodity grown in excess of the assigned quota. But note that it is the system of farm quotas, not of processed quotas, which is being policed, and that the processor is employed only as an instrument in a scheme of regulation which in essence is farm relief.

permitted to market on the mainland no sugar in refined form. Yet no similar maxima for the amounts they were permitted to market in refined form within the continental United States, were set against any mainland refiners, any group of them, or against their number as a whole.

The character of this act of discrimination appended to a farm relief statute is obvious.[18] Puerto Rico may annually market on the mainland refined sugar up to 126,033 tons, but not a pound in excess. It may market far less than the figure fixed or even none at all. To market any refined sugar, it must compete with the coast refiners for the business. Yet the competition cannot be set in reverse; for the accused section endows the coast refiners with the privilege of refining all sugar marketed in the continental United States, without having to struggle for the business, save for the small portions which off-shore territories may refine and market—if they can get the business.

It is here of note that there is no "quota" system for refined written by the Congress into the Act. For neither in Section 207 of the statute, imposing the restraints, nor on Section 101, where terms are defined, is the word "quota" used with reference to "direct consumption sugar". And Section 207 itself fails to reveal even the outlines of a quota system. The coast refiners are more nearly correct when they insist—as they did in the brief before the court below[19] that the limitations upon the off-shore territories are "compensation" to them for limitations which the Act had placed upon their sources of supply. Thus, save for the small quantities specified, Section 207 makes the off-shore territories ineligible to refine sugar for the continental market. It vests, save for these small driblets, the right to refine all sugar to be marketed on the

[18] If Section 207(b) of the Act is valid, other sections may be invoked to instrument it. These other sections also instrument other provisions not challenged here. Thus the severance, by a declaration of invalidity of Section 207(b) or of subsection (a) of the same section as well, will in no wise impair the validity of the rest of this Act unchallenged here.

[19] Reply Brief for the American Sugar Refining Company, et al. (U. S. Ct. of A., D. C., No. 9769), 8.

mainland in the coast refiners. In a word, the Congress, in grafting an alien provision on the Act, treated the continental market as a proprietary domain, upon which, save for minor concessions, the American off-shore territories were forbidden to trespass.

III. HISTORY OF THE INSTANT CASE.

A. The Order, Issues and Judgment.

On January 16, 1948, the Secretary, seeking to secure "an orderly and adequate flow of sugar" and in accordance with Section 205(a) of the Act, issued Sugar Order No. 18 (R. 160-175) allocating among the sugar refiners of the island the maximum of 126,033 tons of refined sugar[20] which Puerto Rico was permitted to market on the mainland. On February 11, 1948, the appellants, the Central Roig and Western Sugar Refining Companies, being dissatisfied with the allocations granted them, sought a review of the order, and questioned the power of the Secretary of Agriculture to make it, in the court below (R. 180-182).

Thus there was presented to the United States Court of Appeals for the District of Columbia Circuit two legal issues.

1. The first, lesser and more immediate question was whether the allocation for the year 1948 of the direct consumption portion of the sugar quota for Puerto Rico did or did not constitute a "fair, efficient and equitable" distribution in accordance with Section 205(a) of the Act.

2. The second, greater and more enduring question was the authority of the Secretary to issue any allocation order in respect to refined sugar or to appoint any limit to the portion of its sugar quota which Puerto Rico could fill with "direct consumption sugar". In other words, it is whether

[20] In technical terms, "direct consumption sugar" is a somewhat broader term than "refined sugar", since it includes all sugar—even semi-processed and raw—which is ready for direct consumption. But, since the terms are so nearly equivalent, simplicity demands the use of the shorthand term "refined sugar", save where statutory language is being quoted, in this brief.

Section 207(b) of the Act, imposing a maximum upon the portion of the sugar quota to be marketed by Puerto Rico within the continental United States which may be filled with refined sugar, represents a valid exercise of an authorized power of the Congress.

It is evident that the two questions are distinct and invite separate answers. For if the Order were found valid, the authority to issue it would still be in question.[21] And if the accused section were found to be authorized by the Constitution, the issue of conformity to standards in the statute would still have to be met. It is true that if Section 207(b) were to be held invalid, the Order would fall with it. But if the Order were held invalid it would not dispose of the challenge to the validity of the accused section. For a decision adverse to the Order could do justice among Puerto Rican refiners only within the confines of the 126,033[22] maximum tons available for allocation. If the insular refiners, like their brethren on the mainland, were able freely to expand their operations, relief could come only from a declaration of the invalidity of the accused section. To avoid the discrimination whereof these refiners and the Government of Puerto Rico complain, the accused section would have to be proclaimed null and void.

In respect to these two issues the lines of legal battle were sharply drawn in the court below. The Central Roig and Western companies confronted the Secretary on both questions. The intervention of the Porto Rican American Sugar Refinery, Inc. was limited to a defense of the Order. The American Sugar Refining Company, et al., and the Government of Puerto Rico, professing no interest in the allo-

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[21] It is admitted by the Secretary that if, reversing the court below, the Order is held valid, there will still be the constitutional question to face. Petition for a Writ of Certiorari (Oct. Term, 1949, No. 27).

[22] The figure 126,033 represents the maximum tonnage available. It is to be remembered that this amount does not go to insular refiners by prescriptive right; it merely marks the outside limit within which insular may compete with continental refiners for the business. The actual tonnage is less than the figure given by the amount of this business which mainland may secure against the competition of insular refiners.

cation, entered the case, the one to defend and the other to attack the validity of the accused section.

After the presentation of briefs, and an oral argument before Edgerton, Clark and Wilbur Miller, J.J., the court below on November 24, 1948, handed down its judgment. In respect to the narrow question it found that the allocations made by the Secretary in Sugar Order No. 18 were not in accord with the standards set down by Congress in Section 205(a) of the Act. Accordingly, "we must reverse it and remand the case" to the Secretary. In respect to the broader question it made no finding. In the words of the decision, "a majority of the court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether Section 207(b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view"—that is of Edgerton, J., the spokesman for the court—"is that we should decide it." The failure to decide this larger question is the issue upon which the Government of Puerto Rico has asked this Court for a hearing.

B. Specification of Errors.

The questions presented by the action of the court below, whose judgment this Court is asked to review, are explicit in the Statement and History just recited and require little elaboration here. The specific errors of the court below, each involving an important issue, now presented to this Court, are three in number.

1. *The Court Below Erred in Denying to a Party in Interest, in a Case in Which the Issue Was Properly Raised and "Fully Argued" in Respect to a Matter of Consequence, a Definition of Its Legal Rights.*

In the proceeding below, the Government of Puerto Rico presented to the court an important question, properly raised and fully argued, involving a definition of its own

rights.[23] It there insisted that the accused section, and the power of the Congress to pass it, rested upon no constitutional warrant; that the arbitrary legislative discrimination was a denial of the civil rights of the people of Puerto Rico, including the ancient liberty of the trade; and that the singling out of Puerto Rico as an object of congressional disfavor put in jeopardy the public policy of the insular government, made difficult the enlargement of its economic base, and arrested its progress.

In its opinion, the court below set down no adequate reason for its failure to give the answer to which petitioner is entitled. Its only explanation was that, inasmuch as "the order is not authorized by the Act", the court "cannot within established principles of review, undertake to decide whether Section 207(b) is authorized by the Constitution." But it gives no definition of these "established principles of review", and a diligent search through the law reports has failed to disclose them. It is true, of course, that if an administrative order is struck down for failure to conform to the statute, it is not necessary for the court to kill what has already been killed by reciting constitutional objections.

But in the instant case the court below was confronted, not with a single simple question, but with two distinct even though related issues. The first question concerned the validity of the allotments under the Order; the second, the authority to issue any allocation order. The parties bringing the suit sought a double relief, first a larger share of the 126,033 tons which the Secretary was allocating; second, a freedom from the restriction of the accused section, so that they could refine as much of the quota of 910,000 tons, which Puerto Rico was permitted to market on the mainland, as they could secure in competition with other insular and all continental refiners. The court, in deciding the statutory question, insisted that Central Roig and Western should have had more, and Porto Rican American less of the lim-

[23] The very substantial interest which led the Government of Puerto Rico to challenge the validity of Section 207(b) of the Act is recited in summary form in pp. 19-23 below.

ited number of tons to be allocated. In refusing to decide the second question, the court failed to state whether Porto Rican American, as well as Central Roig and Western, were free, exercising their constitutional rights, to seek to expand in disregard of the strait-jacket which the Congress had sought to impose upon their operations. By the court's action, a narrow and temporary relief was granted; by its refusal to act a broader and more enduring relief was denied and the interests of the Government of Puerto Rico and its people were overlooked. If two distinct questions are raised, they remain distinct questions; they do not become a single question because in separate ways they are concerned with the same administrative order. It is submitted that as an interested party with a substantial interest in a proceeding in which the question has been properly raised, the Government and the People of Puerto Rico are entitled to a definition of their rights.

2. *The Court Below Erred in Answering the Questions, Properly Presented to and Fully Argued Before It on The Administrative and not on the Constitutional Level.*

The issue here, involving a clash of claims between private parties, is of no legal concern to the Government of Puerto Rico. It has no desire to play favorites among the persons who claimed allocations, all of whom are its citizens. It must, however, point out that the enduring question of the shackles imposed upon off-shore sugar refining cannot be answered upon the administrative level. At the time the decision of the court below was made, November 24, 1948, all sugar subject to the Order under attack had already been marketed. It was too late to change the allocations for 1948; and—aside from a series of minor "clean-up" questions [24]—there was no practical reason for the Secretary to

[24] It seems clear that the petitioners who won below, if they are sustained here, have no claim against the United States, because of an unlawful order of the Secretary. Nor upon currently established principles of law is it easy to see how Central Roig and Western have a cause of action against Porto Rican American who secured and marketed a portion of the allotment to which—if in this matter their victory below is not here reversed—they were entitled.

revise his Order. Nor was there anything upon which the Order after revision could have taken effect. The court's judgment is thus largely moral; it is an admonition to the Secretary, in shaping the orders for 1949 and subsequent years, to be more careful to insure that the allotments meet the standards in the Act. But each year demands its own order; and there is no compulsion upon the Secretary to avoid the infirmities of an outlawed order in writing one to meet the not quite identical circumstances of a subsequent year. In fact the similar Puerto Rico Sugar Order for 1949 [25], in which it has been alleged that the Secretary failed to heed and to follow the statutory decision of the court below, is now under legal attack.[26] There the two dominant questions of the instant case are again raised; and there, as appellants or appellees or intervenors, all the parties to the instant case are to be found. Certainly the reiterated challenge of annual orders is not an effective way to a judicial disposition of the issues here raised.

The sequence of administrative hearing, order, petition to the United States Court of Appeals for review, hearing and decision, and a possible appeal to this Court is likely to consume the greater part or even the whole of the year. Meanwhile all the sugar is marketed under an order which is presumed to be valid. And when validity or invalidity is finally determined, it is too late for a revised order to correct error and to give real relief. The repetition of the case, with the same combatants and the same issues, makes it clear that the questions here presented will not down until definitive answers are given by the court of last resort.

The dominant issue, it must be repeated, is presented, not by the specific allocations in the Order, but by the authority of the Congress to promulgate the mandate upon

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[25] Allocation of Direct Consumption Portion of the 1949 Sugar Quota for Puerto Rico, 14 F. R. 1567-1570.

[26] *Central Roig Refining Company and Western Sugar Refining Company* v. *Secretary of Agriculture, et al.* (U. S. Ct. of App., Oct. Term, 1949, No. 10232).

which the Order is predicated. The dominant protest, alike of the Central Romana and Western Companies and of the Government of Puerto Rico, is the wall which the Congress has erected to block the expansion of the sugar refining industry in Puerto Rico. It is a disservice to all parties who have a stake in the industry to wage a petty and protracted legal campaign along the administrative front. The validity of Section 207(b) is the heart of the controversy and we submit that Judge Edgerton was right in insisting that the court below should have decided it.

3. *The Court Below Was in Error in Refusing to Decide whether or not Section 207(b) Is Authorized by the Constitution.*

It is clear, from the foregoing paragraphs, that the court below was in error in its failure to decide whether or not the accused section was authorized by the Constitution.[27] The two questions before it, although concerned with the same order, are distinct. To rule that the Order was not in conformity with the standards of allocation set down in the statute, neither disposed of the constitutional question nor precluded the necessity of a ruling upon it. Nor has any party been able to demonstrate that the necessity for a ruling on the constitutional question has been precluded. There is no reason why—whatever be the ruling on the specific allocations in the Order—it should not be decided now.

A remand to the court below with instructions to answer will serve no useful purpose. It is understandable that, in the performance of its appellate office, this tribunal as a usual custom demands that the matter in issue be first pro-

[27] A ruling to the effect that there may be error in the failure of a United States Court of Appeals to decide a question properly raised and fully argued is to be found in *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257, 58 S. Ct. 863, involving Section 2, the quantity discount provision in the Clayton Act. The Sixth Circuit had refused to decide the question before it, and the Supreme Court in a memorandum opinion remanded the case with a directive "for a determination of the merits."

cessed by a lower court. The rule is salutary, and in most instances contributes to wider knowledge, sharper analysis, and more informed judgment. The instant case presents the clear exception to the rule. Here the facts are fully presented and none of them is in dispute. Here the parties are all in agreement as to the statutory and the constitutional questions which are involved; these questions are stated by the adverse parties in almost the same words. The constitutional question presents a series of issues at law which must be resolved by oral argument and the presentation of briefs; and ultimately it must be resolved by this Court. Since the case already presents a clear-cut constitutional issue, entirely uncomplicated by other considerations, this Court is as well prepared to entertain the issue as if the court below had expressed an opinion upon it.

IV. THE INTEREST OF THE GOVERNMENT AND THE PEOPLE OF PUERTO RICO.

The Government of Puerto Rico has an interest in this case far greater than that of any of the private parties.[28] It intervenes in behalf of itself, the People of Puerto Rico, the Planning Board, the Agricultural Company, the Industrial Development Company, the Office of Puerto Rico in Washington, and the various other departments, agencies, corporations, and independent establishments of the Insular Government, through which the functions of state, sovereign and proprietary, are performed. It is prompted to support this action, because it is under obligation to realize its economic potential: to develop its agriculture, industry and commerce; to link the insular with the continental economy; to raise the standard of life of its citizens to a minimum of decency; and to rescue its people from a plight which would bring disaster to a less resolute and resourceful population.

[28] This section is an abridgement of the Statement of Interest by the Government of Puerto Rico, presented to the court below, and on the basis of which its motion to intervene in the instant case was granted. For the sake of brevity the language—but in no case the substance—has been somewhat altered. (U. S. Ct. of Ap., D. C., No. 9769.)

It has formulated and is putting into effect a public policy embracing a number of measures through which it hopes to realize these objectives. Its whole program is placed in jeopardy, if this Court holds that the Congress has power to pass the kind of Act represented by the accused section.

Puerto Rico is a territory of the United States. It is eight flying hours from New York City. It is only 100 miles long and 35 miles at the widest. Not more than one-third of its territory is arable land, and of this a large part is marginal. In this confined area a population of 2,200,000 is crowded. The population density is 600 per square mile, fourteen times as great as that of the continental United States. Its agriculture cannot be made intensive enough to support so many persons. It must, if it is to survive, export the labor of its people in the form of "value added by manufacture"; and the higher the skills which go into the goods it sends to the mainland, the greater the volume and value of the products it receives in return. In a word, there is no salvation for Puerto Rico but in industrialization and commerce with the continent.

The island was ceded by Spain to the United States in 1898. Its dominant language is still Spanish, although almost all in the higher income groups also speak English. Its Spanish tradition is slowly yielding to American ways; and its economy, closely linked with that of Spain at the turn of the century, is now oriented to the United States. Although the Insular Government spends one-half of its income on education—a higher percentage than any state in the Union—facilities for learning are still inadequate and the illiteracy rate is still high. The people are highly endowed with potential skills, and training in the industrial arts is bringing out latent talents. The people of Puerto Rico, under the Organic Act as amended, are citizens of the United States, endowed with all the rights and privileges of the citizens of the several states.

The island's economy—the ways and means of life for

its people—has by tradition been agricultural. The dominant crop and the first source of income is raw sugar. Next comes the distilling and sale of rum. Then comes tobacco, pineapples and coffee. But even the new agriculture, resting upon fruits, vegetables and cut flowers of high quality and value, cannot support a population of such density. Although to some extent the pressure of the people upon the land is being relieved by migration to the continent,[29] there must be a shift—a rapid and extensive shift—to a refining, processing, manufacturing base, if the island is to support its population.

In view of this situation, the Government of Puerto Rico has recently embarked upon a comprehensive program for promoting new crops, bringing factories to the island, stimulating trade, and forming "a more perfect union" with the continental United States. To that end it has made a survey of its economic potential, revised its pattern of taxation, set up agencies of government to execute its program, and invested large sums of money in its industrial future. In the policy of the government, expanding opportunity for employment has come to be a first necessity. Section 207(*b*) of the Act—and the reputed power of the Congress on which it rests—puts in serious jeopardy the whole of the Government's program.

The Government of Puerto Rico has a duty to resist every attempt to drive it back upon agriculture and to fasten upon it a colonial status. Its citizens are citizens of the United States and it is under obligation to see to it that

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[29] As citizens of the United States the people of Puerto Rico are legally free to go and come between island and mainland. But as a practical matter that freedom is severely restricted. It cannot, as upon the continent, be effected by a series of moves each at low cost. The overwhelming mass of the population is poor, the per capita income being lower than for the lowest state in the Union; to raise the money for passage to the mainland is an exacting task. The cheaper forms of transport—railway coach, motor bus, flivver—everywhere present on the mainland—are not available between continent and island. Passage only by air at long distance prices, will serve. As the Governor of Puerto Rico graphically puts it, "There ain't no busses running from the Bronx to Mayaguez." An attempt of the Government of Puerto Rico to secure an air service on the coach and motor-bus level is now pending before the Civil Aeronautics Board, Proceeding No. 2123, entitled Additional Service to Puerto Rico.

equality is preserved; that discrimination is avoided; that the rights and privileges of its citizens—including the ancient liberty of a trade—are not denied or abridged to the benefit of other citizens of the United States who happen to live and do business on the mainland. The distance of the island from the continent—ranging from 1200 to 1800 miles—and the inheritance of a Spanish culture impose serious obstacles to the full incorporation of Puerto Rico into the federal union known as the United States of America. The Government of Puerto Rico is under a duty to support every measure which makes for, and to oppose every measure which works against, such a development of the island, its culture and its full and rightful place in our political system. Above all, it is under a duty to see to it that in a belated revival of the Old Colonial System the Congress does not appoint Puerto Rico to the office of producing raw materials for mainland manufacture.

In a word, the future of Puerto Rico and its people rests on the judgment passed upon Section 207(b). For if the Congress can limit the amount of sugar which in refined form the people of the island are permitted to market on the mainland, it can decree—as it has already done for the Virgin Islands[30]—that Puerto Rico can market on the continent no sugar ready for direct consumption. If in respect to sugar, the Congress can limit the mainland market to the raw product, it can do the same thing in other industries, and thus impose a direct prohibition against the processing, refining and manufacture of any finished commodity on the island—save for local consumption. The fate, therefore, of insular industries devoted to such products as cement, plyboard, furniture, textiles, distilled spirits, and glass containers, is tied up in the present case.

Nor here is it to be forgotten that Puerto Rico possesses no political power, aside from its limited control over its insular economy, to shape its industrial, social, and cultural destiny. Although it has been accorded an increasing par-

[30] Section 207(c) of the Act.

ticipation in insular affairs, as yet it enjoys no access to the federal political process. As a minority, remote from the mainland and without recourse to the Congress, its two and a quarter million people must depend upon this Court to vindicate their rights as American citizens.

V. SUMMARY OF ARGUMENT.

The accused section is not authorized by the Constitution; and in enacting it the Congress exercised a power never delegated to it. It invades the civil rights of the people of Puerto Rico, including the ancient liberty to and within a trade; derives neither sanction nor support from the territorial clause; attempts unlawfully to reduce Puerto Rico to the status of a colony; transgresses a treaty between the United States and Spain; violates specific provisions, as well as runs counter to the very spirit, of the Constitution; and leaves the destiny of Puerto Rico to the operation of a political process, to which neither its government nor its people have access.[21]

VI. ARGUMENT.

A. The Citizens of Puerto Rico Are Citizens of the United States and as Such Possess All the Rights and Liberties Guaranteed to Persons and to Citizens by the Constitution, Including the Ancient and Established Liberty to and Within a Trade.

The issues presented by this case reach through the Constitution to the very fundamentals of popular government. Our political order, like all of its kind, derives its just powers from the consent of the governed. The source of all the powers of State is the people; and the Congress can enjoy

[21] A more detailed summary of the argument in a series of legal propositions is presented in the Table of Contents above.

and exercise only such powers as are granted to it by the people. In our own, as well as in all popular governments, the people reserve to themselves all powers which they have not specifically delegated. The rights and liberties reserved to the people lie outside the province of government and by constitutional guarantees are secured against its trespass or invasion.

1. *The People of Puerto Rico While Under Spanish Rule Were Established in the Basic Rights and Liberties Which Are the Heritage of All Free Peoples.*

The ancient rights and liberties of the people are no monopoly of Anglo-American law. Although they differ in detail and in idiom of expression, they are the common heritage of the countries of western Europe. Their existence, belonging to the very substance, is independent of the form of government. They have since time immemorial fixed the legitimate frontiers of political authority; in their name the royal prerogative has been subdued into constitutional government.

The rights and liberties of the people of Puerto Rico are of ancient standing. For centuries they were accepted as the legacy of the Spanish people; and when, with the coming of alien dynasties, the theory of the divine right of kings came into vogue, they were asserted as occasion offered.[32] Little by little, as the king's pleasure was subdued into lawful rule,[33] they won a renewed recognition.[34] In due time through the Constitution of 1876—which in form is a compact between the people and the Crown—an obligation

[32] The antiquity of the idea of liberties of the people reserved against the State and of access to the courts to vindicate reserved rights is not generally appreciated. A full account is set down in William Robertson, History of the Reign of Charles the Fifth, Section III of the first part, preceding Book I. See particularly notes XXXI and XXXII.

[33] Spanish Constitution of 1876. This document and the others mentioned in this section concerned with the liberties of the People of Puerto Rico, before the passage of the Foraker Act, along with a number of others, are to be found in the Documents on the Constitutional History of Puerto Rico.

[34] Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897.

was imposed upon the government to secure to the people their ancient rights and liberties. Their importance is attested by their recitation as Title I [35] of this instrument of popular government. In Articles 2 and 12 of Title I, the liberty of a man in respect to his trade is clearly recognized.[36] Article 12 asserts that "every person is free to select his own profession." Although it is added that "it pertains to the state to issue professional diplomas and to establish standards for those who seek them", the clear intent is that the standards shall be uniform. Article 2 extends this liberty from the "citizen" to the "person" and specifies that "foreigners may establish themselves freely in Spanish territory, may pursue therein their callings, or may follow any profession for the pursuit of which the law does not demand certificates."

The specific guarantee of a man's right to his trade and his liberty within it is reinforced by other provisions of the Constitution. Like our own similar guarantees, it is woven into a document whose very purpose is to abate the absolute power of the Crown. Title I contains, in an idiom indigenous to Spain, a great deal of the substance of our own Bill of Rights. Thus, although "the person of the King is sacred and inviolate", his "ministers are responsible for his acts" and "no royal order shall be executed unless countersigned by a minister who by this deed alone assumes full responsibility". (Title IV, Articles 48 and 49.) The King must be authorized by law to carry out any one of a number of acts of state. (Title VI, Article 54.) By Title IX, the principle of equality before the law is recognized; and it is specified that "the same codes shall govern throughout the monarchy." Although, as is essential when dealing with territories widely scattered, the law must admit "variations determined by particular circumstances", it is specified that with such modifications as are "deemed suitable" there

[35] In the usual translation the Constitution is divided into Titles which are subdivided into Articles; the Articles are numbered consecutively. In some translations the document falls into Articles, divided into Sections.

[36] Constitution of 1876, Title I, Secs. 2 and 12.

shall be applied to "overseas provinces" the laws "which may be promulgated for the Peninsula." (Title XII, Article 88.)

The Old Colonial System hung heavily over Spanish rule. Fact did not measure up to profession; Puerto Rico, like other colonies, was exploited for the benefit of the homeland; and an extension of the civil rights enjoyed by Spaniards living on the Peninsula to Spaniards living in the Antilles was a slow matter. It was not until 1897 that, by a Royal Decree countersigned by the President of the Council of Ministers, a Constitution establishing self-government for the Island of Puerto Rico was promulgated.

This Constitution begins with an extended Preamble addressed by "the Government" to Maria Cristina, the Queen Regent. This Preamble has been generally accepted as the authoritative guide in interpreting the provisions which follow. It, therefore, warrants recitation in some detail. The whole Preamble is animated by the spirit of dealing with Puerto Rico, not as a colony, but as a Spanish territory. The basis of the new system rests upon the harmony of interests of the two countries, a scrupulous respect for mutual rights and obligations, and the desire on the part of the mother country to aid "unceasingly in the development, prosperity and peaceful progress of her beautiful Antilles." The Government will not "withdraw"—or consent to the withdrawal—from Puerto Rico of "any part of what constitutes the liberties, the guarantees, and the privileges" of the people of the island. It is admitted that interests have been vested, based upon mercantile restrictions. It is stated that the transition from the Old Colonial System must be effected gradually. But the Preamble announces that "discrimination" against the Antilles for the benefit of the metropolis is "altogether incompatible" with the "autonomy" it seeks to establish. The need of "markets" for the "rich and abundant products" of Puerto Rico and the "inevitability" of a change "in the commercial system" is clearly recognized. Citizens of Puerto Rico are

citizens of Spain and are to be treated as such. Their interests are not to be sacrificed to those of persons living on the Peninsula. The interests are not in conflict. The very purpose of the Constitution is "to attain a greater degree of prosperity, security and importance for Puerto Rico."

The autonomous government set up for Puerto Rico follows the general outlines of representative government. The island is accorded representation in the Cortes of Spain. At the time of its cession to the United States, Puerto Rico held seats in the Senate and in the Congress of Delegates meeting in Madrid. The island was accorded its own "insular parliament", consisting of the Council of Administration and the Chamber of Representatives. The power of the insular parliament, like that of the Cortes of Spain, was limited by the guarantees of the rights and liberties of Spaniards and of persons as set down in Title I of the Constitution of 1876. Upon the Governor-General was specifically imposed the "power" and "responsibility" to forward for review to the Council of Ministers sitting in Madrid all legislation which he deems to encroach upon these fundamental guarantees (Insular Constitution, Articles 1, 43, and 51). Access to the courts against a violation by "a municipality or a provincial assembly" of rights guaranteed by Title I of the Spanish Constitution and for the redress of grievances is specifically provided. (Article 63.) Such an "abuse of power" is held to be directly contrary to the law of the Constitution. In the insular Constitution the commercial relations of Puerto Rico are made a matter of primary concern, and the relation of the Island to the Peninsula receives particular attention. It was recognized that preferential duties were of long standing and could not at once be abandoned; but in respect to such imposts, Puerto Rico was not at the mercy of the Cortes. Instead, in case of disagreement, "the point in dispute" was to be submitted to a committee of representa-

tives of the Cortes, consisting of an equal number of Puerto Ricans and Peninsulars.

It is unnecessary to continue this recitation. At the time of its cession to the United States, Puerto Rico was represented in the Cortes, had an autonomous government of its own, and might bargain with—but did not have to take orders from—Spain in respect to its industries and trade. Its citizens were citizens of Spain, endowed with all the rights and liberties of Spaniards. The bill of rights—set down in Title I of, rather than attached as an Appendix to, the Spanish Constitution of 1876—proclaims liberties differing somewhat in detail and to some extent cast in another idiom, but on the whole remarkably like those in our own Bill of Rights. Among these the right of a man to, and his liberty within, his trade receive specific mention. The powers of the insular parliament, like those of all branches of government, are strictly limited. With the Puerto Ricans, as with us, these liberties belonged in a province reserved to the people and beyond the reach of government. The Old Colonial System, exploiting overseas possessions for the benefit of the privileged on the Peninsula, was a violation of these liberties. This "commercial system" Spain had agreed to bring to an end. When the United States acquired Puerto Rico, its people were living under the Spanish Constitution of 1876 and the Insular Constitution of 1897.

2. *The United States, in Occupying the Territory of Puerto Rico, Was Quick to Recognize the Established Rights and Liberties of Its People.*

The campaign of the United States against Spain was not a war of conquest. It was preached and officially proclaimed as "a crusade for liberty." The United States came to the aid of patriots, particularly in Cuba, who were in rebellion against Spanish authority. Its aim was to abate the severities of the Old Colonial System, not to ex-

ploit the people of the Spanish Antilles for the benefit of our own continental interests. There was no intent, in respect to Puerto Rico, to substitute the yoke of the United States for the yoke of Spain.

In the period between occupation and formal cession to the United States,[37] the military was careful to make clear that the United States did not come as conquerors. In a letter, dated July 28, 1898, and addressed "to the Inhabitants of Puerto Rico," Nelson A. Miles, Major General, commanding the United States Army, proclaimed that the war was waged "in the cause of liberty, justice and humanity." The "people of the United States . . . bearing the banner of freedom . . . bring you the fostering arm of a nation of free people whose greatest power is justice and humanity to all living within its fold." Its aim is "to bring protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessings of the liberal institutions of our Government . . . it is not our purpose to interfere with any existing laws and customs that are wholesome and beneficial to your people". This proclamation was intended to give effect to Executive Order No. 101, A. G. O. of that year signed by the President of the United States. In a letter of instructions sent out the next day from Headquarters of the Army to subordinate commanding officers, it was proclaimed that, so long as the people of Puerto Rico "yield obedience", they are to have "security" in respect to person and property and "all other private rights and relations." Therein it is expressly stated that, under the military rule, "the freedom of the people to pursue their accustomed occupations will be abridged only when it is necessary to do so."

The formal cession of Puerto Rico, by Spain to the United

[37] This cession was effected by the Treaty of Paris, 1898. A tradition which persists in the island to this day has it that representatives of Puerto Rico, sitting in the two houses of the Spanish parliament, voted to ratify the treaty, and thereupon, immediately vacated their seats. A check of this tradition has been impossible, since we have been unable to find the record of the sessions either in San Juan or in Washington.

States, was effected by the Treaty of Paris, "done in duplicate" on December 10, 1898.[38] The provisions in the Treaty in respect to the rights and liberties of the people are not spelled out in great detail. Article IX, concerned with political allegiance, gives certain protections to Spanish citizens who "remain in the territory" and provides that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." And Article VIII, after providing in detail for the transfer of public property, such as public buildings, structures, highways, barracks, forts and roads from the one sovereignty to the other, specifies that such "relinquishment or cession . . . cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds", whether of local public bodies, or "of ecclesiastical or civil bodies or any other associations . . . or of private individuals of whatever nationality . . . " These provisions are in accord with the elementary principles of international law: One sovereign can cede to another only that which it possesses. Accordingly public property is transferred, but private property—whether realty, chattels or intangibles—remains with its former owner. It is obvious that the rights and liberties of the people belong to the category of private property and all personal rights, all ancient liberties, are to be left to the full enjoyment of the individuals at the time legally possessed of them. The verb "cannot" and the phrase "which by law belong to" are advisedly chosen.[39]

For the Kingdom of Spain did not transfer, it did not attempt to transfer, it could not by law have transferred, the properties, the rights, and the liberties of the people—or any control over them—to another political state. The

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[38] Ratifications exchanged and treaty proclaimed on April 11, 1899.

[39] Whether Puerto Rico is a territory, incorporated or not incorporated into the United States, has nothing to do with the matter. The error in contending otherwise is attested by the fact that in respect to rights and liberties, the people of Puerto Rico have from the first had the equivalent, and are now in full possession, of United States citizenship.

Spanish signers of the Treaty were aware that they could not sign away the inalienable liberties of the people which stemmed from a source older than the government itself. For by the compact between People and Crown, which is the Constitution of 1876, the peoples of Greater Spain, including Puerto Rico, had reserved unto themselves the traditional liberties; and the Crown of Spain possessed no power to transfer to another sovereign that which it did not itself possess. Though the matter need not be pursued here, it is not easy to see how the United States, a popular and constitutional government, even had it been proferred, could have acquired from Spain the power to quash or abridge these ancient liberties.

At the time there was clear recognition by the officials of the military government of Puerto Rico that there existed no authority to abridge or deny the liberties of the people. The whole matter is set forth in detail in an Allocution by the commander of the military forces, dated August 15, 1899, which he caused to be published in all the local papers. The military is to be tolerated for a time, because "it is impossible to supply any other form of governmental control." But—note the easy shift from the Spanish Constitution to our own—"an arbitrary government over any territory included within the United States is not contemplated by the American Constitution and laws"; for our "whole theory of government is based on the principle that the people themselves are to make and enforce their own laws." It follows that by every means, it "has been the practice of the military . . . to learn the views and wishes of the people themselves," and to adapt to their views the systems of laws and administration which the Congress was expected presently to establish. The current transition stage was to be "one preparatory" to "full statehood" and "membership in the National Union." And, "whatever compromises might for a short time be demanded by military exigency," the end was "complete territorial autonomy." A bad economic state "was ad-

mitted to exist . . . in many municipalities"; changes had to be made in order that "self-government and full autonomy" might be instituted; and time was necessary to bring the government into accord with the principles of law, equity and absolute justice. In particular it was proclaimed that the tariff and trade laws now prevailing were soon to be materially changed so that an impetus might be given to industrial development and remunerative labor found for the unemployed. The task was "to make ready this island for a territorial regime when Congress shall be ready to enact it."

3. *To the Citizens of Puerto Rico Have Been Extended All the Rights and Liberties Which Attach to Citizenship of the United States.*

The period of military occupation was brief. There followed a short transition period, extending from the ratification of the Treaty of Paris to the establishment of the civil government for Puerto Rico, provided for by the Foraker Act of Apr. 12, 1900, C. 191, 31 Stat. 77.

The rights and liberties which the people of Puerto Rico had enjoyed as Spaniards were not to be lost; instead the Act did much towards converting these ancient liberties into the larger and richer rights of United States citizenship. Although the Governor was to be appointed by the President, and, instead of the representation which the island had enjoyed in the Cortes, a single Resident Commissioner was provided, the Act did accord to Puerto Rico a large measure of local self-government. "All inhabitants continuing to reside in Puerto Rico who were Spanish subjects on the 11th day of April, 1899"—unless by formal declaration they chose to remain citizens of Spain—and "their children born subsequent thereto", became citizens of Puerto Rico; and they, "together with such citizens of the United States as may reside in Puerto Rico", were to

"constitute a body politic under the name of The People of Puerto Rico." (Act, Section 7.)

In the People of Puerto Rico rights and liberties of old were recognized and enlarged. "The laws and ordinances of Puerto Rico" were to "continue in full force and effect . . . so far as the same are not inconsistent or in conflict with the statutory laws of the United States." (Act, Section 8.) In fact, all "the statutory laws of the United States not locally inapplicable" were to have "the same force and effect in Puerto Rico as in the United States." (Act, Section 14.). To citizens of Puerto Rico writs of error and appeals were to be allowed from local courts to the United States Supreme Court "in all cases where the Constitution of the United States or a treaty thereof or an Act of Congress is brought into question" (Act, Section 35). The powers of the Governor and of the Attorney General of the Insular Government are written in terms of "the powers of a Governor or an Attorney General of a Territory of the United States" (Act, Sections 17, 21). A "commission" was to be authorized "to compile and revise the laws of Puerto Rico, . . . to frame and report such legislation as may be necessary, to make a simple, harmonious, and economical government, . . . and make all other provisions that may be necessary to secure and extend the benefits of a republican form of government to all the inhabitants of Puerto Rico." (Act, Section 40.)

This process of enlarging and enriching the ancient liberties of the people of Puerto Rico has constantly gone forward. In 1917 the Jones—technically known as the Organic—Act succeeded the Foraker Act. In it the Bill of Rights is put to the front (Act, Section 2); and in the words, "no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty or property without due process of law" there is withdrawn from the local legislature—as there had been withdrawn from the Congress itself—the power to deny or abridge the ancient rights of the people. The insular legislature is given great latitude

in respect to internal revenue; yet it is provided (Act, Section 3) that "no discrimination" shall "be made between the articles imported from the United States . . . and similar articles produced or manufactured in Puerto Rico." The context of the document makes it clear that, as between Puerto Rico and the United States, such a prohibition upon discrimination is meant to be reciprocal. The body politic of Puerto Rico is enlarged to include natives who were absent from the island when its inhabitants in 1901 were blanketed into citizenship; citizens of the United States who have resided in the island for one year are granted Puerto Rican citizenship; all natives whose fathers elected Spanish citizenship, and "are attached to the principles of the Constitution of the United States," are permitted to become Puerto Rican citizens; and all citizens of Puerto Rico "are hereby declared and deemed to be citizens of the United States," and are now vested with all the rights and liberties of citizens of the several states (Act, Section 5, and amendments set down as 5a, 5b and 5c; Acts of Congress approved March 4, 1927, June 27, 1934, and May 16, 1938).

The Organic Act has been many times amended. The amendments, without exception, have tended to enlarge the liberties of the citizens of Puerto Rico and to recognize their right to participation in the processes of democratic government. In 1946, for the first time, a native of the island was appointed Governor; in the year 1948, "the body politic" known as the People of Puerto Rico, by authority of an Act of Congress—80th Congress, 1st Session, Aug. 5, 1947, Pub. 362—for the first time elected their own Governor. Thus, by a series of Acts, the Congress, for the people of the island, has underwritten the ancient liberties. A citizen of the United States carries with him his heritage of liberty wherever he may go within the country. Under our Constitution, the rights of persons and of citizens do not depend for enjoyment upon the accidental fact of whether one lives and does business on the mainland or on an island.

4. *The Liberty of a Man to, and Within, His Trade Is Among the Oldest and Best Established of Our Liberties; Its Protection Is Grounded Alike in the Common Law, in the Anti-Trust Acts and in the Due Process Clauses of the Constitution.*

The great ordinances of the Constitution, which recognize a province of civil liberties, are a heritage built up over the centuries. By these ordinances no person by the federal government may be deprived of life, liberty or property without due process of law. In a secure federal system, possessed of limited and delegated authority, the ancient liberties of persons are barricaded against the arbitrary use of political power. These safeguards are written in the terms, not of citizen, but of person. The word "person" is the broader, it comprehends alike the citizen and the alien. Here the guarantee is to the person, but the citizen who is a person cannot be put outside the orbit of the guarantee.

The freedom of a man to enter the trade of his choice, and within that trade to be secured in the exercise of his liberty, is numbered among the most ancient and best-established of our liberties. Under our legal system all trades are open to all who are able and willing to take their chances; all traders are free to conduct their own affairs as they please. The law accords to the trader, not a privilege, but an opportunity. The liberty of a man to, and within, his trade is limited by the liberty of all other men to, and within, the same trade. A man is at liberty to make deals, to seek new customers, to enlarge his facilities, to expand his business so far as his own initiative, energy and judgment will allow. The only proviso is that, in exercising his liberty along these lines, he must not encroach upon the similar liberty of others. The freedom of a man in his trade is subject to the ancient rule against restraint. The trade is to be kept open to all comers; all traders are to enjoy access to an

open market; in all that the trader does, he must carry on under competition.

The guarantee to a man of free access to his trade and to the open market in the sale of his goods is elementary in Anglo-American law. The common law prohibition against restraint of trade goes back to the days of the Year-books. The *Schoolmaster's Case*, Y. B. Hen. IV, p. 47, pl. 21 (1410); the *Meat Market Case*, Y. B. Hen. VI, p. 19, pl. 13; p. 25, pl. 2 (1483) and the *Dyer's Case*, Y. B. 2 Hen. V., p. 5, pl. 26 (1415). It was accorded standing and definitive statement in the days of the Tudors and the Stuarts. An *Anonymous Case*, Moore 115, 71 Eng. Rep. 477 (1576); the *Blacksmith's Case*, 3 Leon, 217, 74 Eng. Rep. 645 (1587); *Case of the Tailors of Ipswich*, 11 Coke 53a, 77 Eng. Rep. 1218 (K. B. 1614). The courts even refused to accept a royal grant of monopoly as a sanction for closing a trade against the newcomer, *Darcy* v. *Allen*, 11 Coke 84b, 77 Eng. Rep. 1260 (K. B. 1602). It played an important role in the movement to abate the royal prerogative, remove trade regulation from the King's pleasure, and make secure, against vested privilege, the liberties of subjects of the Crown. The Statute of Monopolies, 21 Jac. I, ch. 3 (1623-24) was not a new statute of the Realm; instead it was in form and effect a declaration of what the law had been since time immemorial. A man's right to his trade was inseparable from the hard-won liberties of the people.[40]

So great was the prestige of the rule that the Fifty-first Congress, after a protracted effort to frame its own anti-trust statute, fell back upon the common law and wrote the Sherman Act in the classic words of the rule against restraint. TNEC, Monograph No. 16, Antitrust in Action, Ch. 2, p. 8. Thus the common law rule was made applicable to commerce among the several states. As stated by Mr. Chief Justice Hughes, in *Appalachian Coals, Inc.*, v. *U. S.*, 288 U. S. 344, 359, 53 S. Ct. 471, "As a charter of

[40] The Petition of Rights and the Bill of Rights are to be found in any collection of documents upon the Constitutional History of England.

freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." The Sherman law has not been treated by the courts as an ordinary Act of Congress. By its ban on restraint and its prohibition of monopoly, the liberty of a man in respect to his calling has been recognized as a principle basic to the operation of the industrial system. And because it fixes the general pattern of our national economy, the Sherman Act has been accorded the standing of a constitutional measure. *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811; *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 68 S. Ct. 915; *Federal Trade Commission* v. *The Cement Institute*, 333 U. S. 683, 68 S. Ct. 793. The right conferred by the patent grant, for instance, is severely limited by the anti-trust laws. *Carbice Corporation* v. *American Patents Development Co.*, 283 U. S. 420, 51 S. Ct. 496; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 315 U. S. 788, 62 S. Ct. 402; and *Mercoid Corp.* v. *Mid-Continent Inv. Co. et al.*, 320 U. S. 661, 64 S. Ct. 268. Even where, as with the railroads, a system of regulation has been established to serve the public interest, the courts have been unwilling to permit persons who are carriers to surrender their liberty of action to a private authority which voluntarily they have set up. *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 S. Ct. 540, and *State of Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439, 65 S. Ct. 716.

The right of a man to, and within, his trade has in fact been lodged within the Constitution itself. The civil rights of persons are not limited to the liberties which may be safely indulged without fear of disturbing the prevailing political and economic order. [41] They include the liberties which are essential to the maintenance of the individual's opportunity. As long ago as the *Slaughter House Cases*,

[41] It is of note that, in respect to the general pattern and the operation of the national economy, the anti-trust acts play a role analogous to—in fact almost identical with—that which constitutional provisions play in respect to the general pattern and operation of the federal government. Nor are the blessings of liberty, domestic tranquility and the general welfare less dependent upon the national economy than upon the federal government.

16 Wall. 36, 21 L. Ed. 394, it was argued that the ancient liberty of a man to the free choice of, and freedom of action within, his trade was among the privileges and immunities of United States citizenship which no legislature in the Union could deny or abridge.[42] Although at the time the argument won the support of only four of the nine Justices, it would not down. It was presently repeated in a concurring opinion—*Butchers' Union Slaughter-House & Livestock Landing Co.* v. *Crescent City Livestock Landing & Slaughter-House Co.*, 111 U. S. 746, 4 S. Ct. 652. There Bradley, J., at p. 658, states: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And Field, J., at p. 660, has it that: "All grants of this kind are void at common law, because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood . . . " All this is now set down in the language, not of the privileges and immunities of the citizen, but of a liberty which can not be denied or abridged "without due process of law."

A little later the Supreme Court held that the exclusion of some persons from a trade which was open to other persons was a denial of the equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, a decision which has become established law—and which with some difference in attending circumstances—was recently repeated by the Supreme Court. *Torao Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 68 S. Ct. 1138. In time the right of a person in respect to his trade, in the language of "liberty of contract" came to be established as a constitution doctrine.[43]

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[42] The issue is fully explored in the briefs presented to this Court in behalf of the Butcher's Union by ex-Justice John A. Compbell in the Slaughter House cases. The challenged act was a legislative grant of monopoly, and Mr. Campbell was employing the Fourteenth Amendment as an anti-trust law.

[43] It serves little useful purpose here to pursue the old dispute as to whether a person's right to his trade is a "liberty" or a "property". It has been called both a liberty and a property. "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful," quoted in *Mlle. Reif, Inc.* v. *Randau*, 166 Misc. 247, 1 N. Y. S. 2nd, 515 (1937); *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105, 49 S. Ct. 57 (1928). It is for the present purpose enough that since days of old it has legally been accounted a civil liberty.

Adams v. *Tanner*, 37 S. Ct. 662, 244 U. S. 590, and *New State Ice Co.* v. *Liebmann*, 285 U. S. 352, 52 S. Ct. 371.[44] In the famous case of *A. L. A. Schechter Poultry Corporation, et al.*, v. *United States*, 295 U. S. 495, 55 S. Ct. 837, the right of the various managerial groups—even when acting under the cloak of power delegated by the Congress—to establish codes and to set up authorities for the self-government of the several industries which make up the national economy was struck down as unconstitutional. An unanimous Supreme Court was unwilling to sanction an arrangement under which the liberties of members of a trade were put at the mercy of their competitors. No one among the ancient liberties which the due process clause seeks to secure is more firmly embedded in the fundamental law than the liberty of a person to and within his trade.

B. The Accused Section, in Violation of the Due Process Clause of the Fifth Amendment, Abridges the Civil Rights, Including the Ancient Liberty of the Trade, of Citizens of the United States Who Live and Work on an Island to the Benefit of Citizens of the United States Who Live and Work on the Mainland.

A careful analysis of the accused section,[45] against the background of the code for the regulation of industry shows that it has no lawful place in a comprehensive scheme for imposing order upon the sugar industry. Section 207(b) does not represent a valid exercise of the federal police power.[46]

[44] The dissents in these cases do not challenge the general principle of the liberty of the trader. Instead they are an insistence that a rightful regard for an outstanding public interest may make abridgement of this liberty a proper exercise of the public power and hence a satisfaction of the demands of due process. But no language in the dissents accepts, or suggests, a power in the legislature to depart from the rule of equality before the law.

[45] The accused Section 207(b) of the Act reads, "Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value of the quota for Puerto Rico for any calendar year may be filled by direct consumption sugar" (7 U. S. C. A. § 1117).

[46] It was, in days before the elaboration of a comprehensive federal code of trade regulation, good usage to refer to "the police power" as belonging to the several states. And, in strict accuracy, the authority of the Congress to regulate stems from the several distinct powers granted to it, and each exercise has its specific justification. But so usual has become the regulation of trade regulation, good usage to refer to "the police power" as belonging to the federal jurisdiction is no longer taboo.

Our system of law knows nothing of the King's pleasure, the granting of special privilege, the vesting of a private interest, the use of the police power to confer a favor or to work a detriment. As our code has been elaborated to meet the needs of an increasingly complex society, the principle of equality before the law has been preserved. Where licenses, franchises and other grants have been given, they have been regarded, not as indulgences to favorites of the State, but as instruments of the general welfare. Where, amid the varied circumstances of a modern democracy persons have been too differently situated to be treated exactly alike, necessary departures from uniformity have had to stop short of playing favorites.

1. *The Liberty of the Person to and Within His Trade Can Be Denied or Abridged Only by Due Process of Law, That Is by the Exercise of the Police, or Regulatory Power to Serve a Public End.*

In accord with a legal system which plays no favorites, the economic liberty of the person is the general rule; the abridgement of the liberty the exception—justified only by service to a public purpose. A legislative departure from the ancient liberty to and within a trade is sanctioned only when the free and open market fails to secure industrial order. In such cases a restriction upon industrial opportunity may be needed to hold business activity to its appointed path. In all such cases regulatory safeguards are set up against the abuse of private power.

No single pattern, even that of the ancient and honorable competition system, will serve the needs of the distinct industries which make up a far from uniform national economy. It is fortunate, therefore, that in the police power the legislature possesses an instrument for making the needed adjustment.[47] But the police or policy power, that

[47] *Police Power*, 12 Encyclopedia of Social Sciences 190; *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

is, the general power of regulation, is an instrument of the general welfare, not of special privilege. While it is flexible enough to serve particular cases, its use must meet the demands of fair play. It is not to be employed as a means of favoritism or privilege. Its use by the legislature carries no authority to enrich, to vest with privilege, or even to confer opportunity upon certain members of an industry at the expense of their fellow members. On the statute books, federal and state, is a large and complex code of trade regulation. In all its multiple variety this legal code attests the fact that in the cases in which economic liberty has been abridged, the purpose has been to secure the ends which economic liberty is presumed to serve.[48]

Thus, in respect to the learned professions, where the trade is a "mystery" and the consumer is not a proper judge of the quality of the service, the state intervenes to insure competence. Standards of knowledge and skill are fixed for admission to the practice of law, medicine, dentistry and the like; and of late for admission to some less learned callings, such as that of the beautician, the realtor and the mortician. But the standards are fixed for all alike; and all who are licensed enjoy exactly the same rights within the profession and exactly the same liberty to compete for client or patient.

In recent decades the trend has been to convert an unregulated into a lawful competition. No longer is the operation of the industrial system left to a series of bargains among interested parties. As respects some aspects of business, the bargaining process has been brought under public control; other aspects of business have been withdrawn from it altogether. But, wherever the State has fixed standards for weights and measures, the purity and

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[48] A long catalogue of cases can be cited in support of the established place within our system of law of the liberty of the person to, and within, his trade. The following cases, taken from diverse jurisdictions, indicate the character of the rule. *Hubman* v. *State*, 33 S. W. 834, 61 Ark. 482; *Chicago* v. *Collins*, 51 N. E. 907, 175 Ill. 445; *Ex parte Pferrmann*, 66 P. 205, 134 Cal. 143. The rule almost meets the Roman standard for the law of that which is true *semper, ubique et ab omnibus*.

quality of the commodity, hours of labor, minimum wages, and the like, legislation has imposed its obligations with impartiality. If exceptions have been written to general laws, they have usually been to the benefit of under-privileged groups or of small business and because of a legislative recognition of the intensity of the struggle of such groups for survival. The great bulk of this legislation may be described as in the nature of setting rules for the competitive game. It neither grants to the privileged competitive advantage nor imposes upon the unfavored a competitive disadvantage.[49]

Even where by legislative act a measure of tolerance is accorded to action in concert, the ends of economic liberty are kept in mind. Thus, in statutes which provide for a resort to collective bargaining by labor, the objective is not to prohibit the free play of economic forces. It is rather to protect the unorganized against the tight and compact group with which it must deal; to promote fairer bargains by securing a better balance between the parties; to realize the very objectives the competitive system is designed to serve. The Wagner and kindred acts—29 U. S. C. §§ 151-166, July 5, 1935, c. 372, 49 Stat. 449; the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115, March 23, 1932, c. 90, 47 Stat. 70—are predicated upon the propositions that in comparison with "capital", labor possesses inferior bargaining power and that legislation in redress of such inequality, in the words of Mr. Justice Holmes, is intended "to establish that equality of position in which freedom of contract begins".[50] Dissenting opinion in *Coppage* v. *Kansas*, 236 U.S.

[49] *U. S.* v. *Seventy-five Boxes of Alleged Pepper*, 198 F. 934; *Bumpus* v. *Continental Baking Co.*, 124 F. (2d) 549; *U. S.* v. *Darby*, 312 U. S. 100, 61 S. Ct. 451; *Champion* v. *Ames*, 188 U. S. 321, 23 S. Ct. 221; *Hipolite Egg Co.* v. *U. S.*, 220 U. S. 45, 31 S. Ct. 364; *U. S.* v. *Carolene Products*, 304 U. S. 144, 58 S. Ct. 778; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578; *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 495, 57 S. Ct. 868; *Chas. C. Steward Mach. Co.* v. *Davis*, 301 U. S. 548, 57 S. Ct. 883.

[50] The courts, of course, possess no facilities for weighing the unbalance. In oft-repeated words Mr. Justice Holmes has insisted that the test is the reasonable belief of the legislature. As that belief has changed—and still remains reasonable—the legislation is, within the bounds of due process, subject to correction. Thus at a later date the Congress, viewing the unbalance differently or deciding that in recent years it had been at least partially corrected, passed the Taft-Hartley Act, (29 U. S. C. A., 141 et seq., 61 Stat. 136).

1, 35 S. Ct. 240. To the same effect the idea that the farmer is in an inferior bargaining position in the sale of his crops finds expression alike in judicial utterance and in Acts of the Congress granting to him a qualified exemption from the antitrust laws. Capper-Volstead Act, 7 U. S. C. §§ 291-292; 42 Stat. 388; Cooperative Marketing Act, 7 U. S. C. §§ 451, 457; 44 Stat. 802, 803; Fisheries Cooperative Marketing Act, 15 U. S. C. §§ 521, 522; 48 Stat. 1213, 1214; Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §§ 608b, 608d; 48 Stat. 31, 49 Stat. 753, 761, 50 Stat. 246; Packers and Stockyard Act, 7 U. S. C. §§ 192, 225; 42 Stat. 161, 168; Communications Act of 1934, 47 U. S. C. § 222(b)-(f), 57 Stat. 6; and Civil Aeronautics Act of 1938, 49 U. S. C. 488; 52 Stat. 1001. All such statutes are alike in making provision for a properly qualified government official or agency to take action if there is reason to believe that the tolerance is being abused or that the beneficiaries of the legislation had moved from an inferior to a superior bargaining position.[51] The rationale in all such measures is to employ legislation to correct an unbalance, and to put members of a group in position to make effective their economic liberty.

But our national economy, far from uniform in character, is a huge and complex affair. It is made up of a host of industries which differ in structure, in technology, in pattern of trade practices, in the places which they occupy within it. Because of this variety the free and open market can operate only with varying degrees of perfection. If under the rule against restraint an industry operates without notorious evils the disposition alike of the legislature and the judiciary is to leave it alone. It is only when industrial disorder has brought substantial harm, when competition has failed its regulatory office, and when disorder

[51] For example, the second section of the Capper-Volstead Act, 7 U. S. C. A. 292, 42 Stat. 388, reads:

"If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, . . . "

has become notorious that the legislature seeks to abate the liberty of a trade. The examples of such governmental interference fall into two general classes—namely to insure to the public relief from under-competition and to hedge a group dependent upon a single industry for its livelihood against the destructive impact of an overdose of competition.

The dominant—almost the exclusive—examples of legislative relief for the public against undercompetition are the so-called public utilities.[52] In respect to the railroad, the telephone, power and light, the street railway, investment is heavy, the ratio of fixed cost to out-of-pocket expense is high, duplication of plant and service is needless. To open such an industry to all comers is nothing short of a public extravagance—and often, as with the telephone, a positive nuisance. But in all such cases, the hazards of the closed door have been recognized; and upon a regulatory agency, usually set up as a commission, is imposed the task of securing to the public the protection which competition is presumed to effect. It is the duty of this authority to see to it that service is adequate and regular; that performance is kept up and price down; that strategic position is not capitalized into excess profits.

But difficulties attend the attempt of any regulatory authority to take over the role of the market; and, even in the face of regulation, the courts have been reluctant to relax completely the safeguards of the system of economic liberty. Shortly after the turn of the century the Supreme Court, in spite of the Interstate Commerce Act of 1887, recognized a place for competition in the operation of the railroads—*U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 S. Ct. 540—and only a short time ago, in spite of an elaborate code for the regulation of the railroads which has been built up over the years—Transportation Act as amended, 49 U. S. C., especially §§ 3, 15, 30, 33, 73, 74, 102—the Court found itself unwilling to accord to the Eastern

[52] It is of note that at first "public utility" was a name for the end, not for the instrument. The railroad, the waterworks, the street-railway were said to serve "the public utility".

and Southern railroads immunity to the anti-trust laws. *State of Georgia* v. *Pennsylvania Railroad, et al.*, 324 U. S. 439, 65 S. Ct. 716. And, in respect to power and light, the failure of regulation as an instrument of control has led to a revival in a modern form of the older rule; and in its "yardstick" the Tennessee Valley Authority has forged a competitive weapon for keeping service up and rates down. *Ashwander* v. *T. V. A.*, 297 U. S. 288, 56 S. Ct. 466; *Tennessee Electric Power Co.*, v. *Tennessee Valley Authority*, 306 U. S. 118, 59 S. Ct. 366.

The principal—almost the exclusive—example of legislative relief from over-competition is to be found in the agricultural and extractive industries. In the production of such staples as corn, milk, wheat, cotton, and tobacco a multitude of farmers and of farm laborers are engaged. These persons, who take their living from the soil, constitute a substantial interest within the commonwealth, the maintenance of whose purchasing power is essential to the operation of the national economy. In respect to each staple crop, our capacity to produce, augmented as it is by the progress of the agricultural arts, is vastly in excess of what the market—at prices which will give to the farmer a decent standard of life—can absorb. Yet, barring the intervention of the government, there are no effective techniques for adjusting an over-done and fluctuating supply to a fairly constant demand. Even if it was lawful for them to do so, the innumerable producers of oats or peanuts or potatoes could not get together, work out a voluntary system of restriction, allocate the agreed-upon acreage among themselves, and police against rebellious members, the indignant public, and the state, the decrees of their own private government. Long experience with all of these staples has demonstrated the incapacity of the free and open market to effect the adjustment. Here, as with other commodities, low or high price may be a signal to increase or to decrease production. But, if the market is to perform its function, the response to the price-signal must be approximately

exact, not too much or too little. Among a multitude of farmers, each acting for himself, not even an approach to the necessary precision is possible.[53] The matter is made the more difficult by the one-crop system. Whatever the crop, there is always a stubborn minority—enough to keep the open market from doing its work—which insisfs upon its own way. In the staple crops, unlike processing and manufacture, price cannot be made to serve as a guide to production. The government is invoked to do what the market, responding to a multitude of separate judgments, cannot do for itself.[54]

The classic cases on the validity of legislation designed to shield exposed groups from the impact of an overdone competition are *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855.[55] In the *Nebbia* case the issue was the validity of a state statute designed to stabilize the industry by putting

[53] The matter stands out sharply in the concrete instance. Let us assume a bumper crop and a low price for cotton. Farmer A decides that at such a low price cotton does not pay; next year he will put his ground to cowpeas. Farmer B says to himself, "What Farmer A does, other farmers will do. With so much acreage withheld, there will be a short crop next year; so I'll put all my acres in cotton and make a killing." Farmer C solliloquizes, "Most farmers are about as smart as Farmer B and no smarter. They expect to clean up on the restraint of their neighbors. Too many persons are out for a killing. Next year's price will make this year's look high. So I'm laying off on cotton." What comes about depends upon how many Farmers A, Farmers B and Farmers C there are. See Robert H. Montgomery, The Cooperative Pattern in Cotton.

[54] An article in 4 Encyclopedia of Social Sciences, 438 *supra* ,by Mordecai Ezekiel; briefs for the U. S. in *U. S.* v. *Butler*, 297 U. S. 1, 56 S. Ct. 312 *supra*, brief of the U. S. in *Mulford* v. *Smith*, 307 U. S. 38, 59 S. Ct. 648. The argument for the incapacity of the free and open market to effect the adjustment is not disputed by Mr. Justice Roberts who spoke for the court in the *Butler* case. It is significant that he found the opposition of a pattern of control essential to banish chaos from the industry to lie outside the powers delegated to the Congress by the Constitution, even in the disorderly agricultural industrials committed to the production of staple crops. It was not until some years later, in *Mulford* v. *Smith*, *supra*, where the Act as rewritten to substitute marketing for production quotas was before the Court, that he made an admission of the limited constitutional power to employ legislation to meet the situation.

[55] The two cases are leading in distinct and even contrasting ways, the *Nebbia* case for its holding, the *Carter* case for its record. The *Nebbia* case recognized for the first time the power of the legislature to exercise control over price in a competitive industry. In the *Carter* case, the United States built up an elaborate record demonstrating the incapacity of the free and open market to abate the plight of bituminous coal, with its roots in over-capacity.

a floor under milk prices. There the police power of the state was in direct opposition to liberty of contract. Representing a minority of four, Mr. Justice McReynolds stood staunchly for the ancient liberties and for leaving regulations to the market. For the majority of five, Mr. Justice Roberts said in effect that the state had the power to lend a hand to help competition over the hard places. In the *Carter* case the issue was the validity of a federal statute designed to lessen, if not to end, the notorious plight of the soft coal industry. The issue of due process, although stubbornly argued, received little formal consideration in the opinion. Instead the majority of the Court, by Mr. Justice Sutherland, struck down the labor controls in the Act as applying to matters within the province of the several states and beyond the reach of the Congress. And, since for the Court he preferred to sever the price from the labor provisions[56], the whole act fell.[57] In dissent Mr. Justice Cardozo recites the notorious case of bituminous coal and argues the incapacity of the market to bring order to the industry.[58]. Although Mr. Justice Cardozo's discussion is addressed to an extractive industry, the analysis neatly fits the case of the staple crops. For under our legal system, the first reliance is upon liberty of contract; and in cases where the open market fails in its function, the state with appropriate measures may come to the rescue.[59]

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[56] The legislative power over price was established in the *Nebbia* case. Accordingly there is by the court no declaration of the invalidity of the price provisions as such. They fall only because they cannot be severed from the labor provisions. Mr. Justice Roberts does not dispute the fact that the plight of bituminous coal, like that of milk, creates a "felt need for legislative relief".

[57] Wagner Act cited *supra* has been found to be constitutional, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; 57 S. Ct. 615.

[58] A new bituminous coal act was passed by Congress, drafted to take account of Mr. Justice Sutherland's opinion and was in *Sunshine Anthracite Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, found to be valid. The ruling in respect to labor controls has long since ceased to be law.

[59] It was contended in *Wilson* v. *New*, 243 U. S. 332, 37 S. Ct. 298, that the Constitution required the fixing of the hours and the wages of railroad employees to be left to liberty of contract. For the Supreme Court, Mr. Chief Justice White argued that in the case before it liberty of contract had already had its chance and that in the face of its failure the state was not left helpless. The opinion is alike a statement of the rationale of liberty of contract and a definition of the type of circumstance which warrants legislative departure from the general rule.

In the *Nebbia* case Mr. Justice Roberts is quite correct in saying that "the Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." As the argument above has shown, the state may interpose its authority to assure a minimum of competition, to establish fair rules for the competitive game, to secure to the consumer high quality and reasonable price, to put a floor under an industry run wild, to rob an acknowledged monopoly of its exploitative power, or to shield a substantial group from the impact of the price fixed by a market out of hand. But all such interferences are expressions of policy designed to serve a public purpose. Together they mark out the lawful limits of the province of government. They give no warrant for the Congress to dispense its favors at its legislative pleasure. The proper office of public control is to attain the ends which a functionless competition fails to secure.

2. *Raw Sugar, Under the Operation of the Free and Open Market, Proved to Be An Industry in Distress and the Congress Was Within Its Powers in Using Legislation, with Fairness to All Interests, to Abate the Disorder Attending Its Production.*

The case of raw sugar meets squarely the rationale of resort to regulation to lessen or put an end to industrial disorder. The experience of decades bears testimony to the inability of the free and open market to impose order upon the production of sugar. It presents overwhelming evidence to the incidence of disorder in economic insecurity for all concerned, a perennial disparity between price and cost of production, the denial to workers of an opportunity to obtain and make secure a decent standard of life. Sugar is a subtropical crop, and wherever it is grown, nature is insistent. The beet and cane regions of the United States fall far short of the continental demand. And if the domestic territories off-shore, Hawaii, Puerto Rico and the Virgin Islands, are added, the supply is still inadequate. The Republic of the

Philippine Islands cannot fill the deficit; and Cuba, an island under a foreign flag, is called upon to fill out the needed supply. Cuba alone could do more than meet our mainland requirements. So long as there were no trade barriers, our continental markets were targets for sugar imports from all over the world. The market did not "tend to break"; it was always broken; and the mechanisms by which price is made to cover costs of production refused to perform. As a result an approximation of price to cost was achieved largely by taking the deficit out of the meager wages of the worker in the cane fields. Instead of the fair bargain the market is supposed to achieve, the consumer came to be subsidized by the sugar planter and his laborers. The disorder found a continuing incidence in a supply which outran demand, in a plague of bankruptcies, in a vain struggle of workers to achieve decency. The members of the industry were scattered across the globe; differences in cultures, ways of thought, and speech forbade an united attack upon a common problem; there could be no concerted action to impose a pattern upon, or to restore health, to the industry. The only alternative to chaos was governmental action.

It is to the elimination of the evils of a functionless competition that the Sugar Act in its several versions—the Jones-Costigan Act, the Act of 1937, the Act of 1948—is directed. It isolates an area consisting of the Continental United States, the Republic of the Philippine Islands, the Virgin Islands, Puerto Rico, Hawaii and Cuba from the world market. It imposes upon the marketing of raw sugar an elaborate pattern of control. It puts the public interest to the front by directing the Secretary of Agriculture, as a predicate to the whole system of regulation, annually to estimate the total demand for sugar by the people and the industries of the Continental United States.[60] (Act, Section 201.)[61]. It then directs the Secretary, under instructions

[60] It is of note that as here used in the Act "demand" is not demand at a fixed price. At the very low price at which sugar is sold, even under the scheme of regulation, demand is fairly constant.

[61] Act, Section 201, Appendix C, pp. 128-129, below.

designed to insure that it is "fair, efficient and equitable," to establish quotas for each of the several territories, both mainland and offshore, from which the Continental United States receives its sugar.[62] Specific quotas are assigned to the beet and cane regions on the mainland, to the domestic off-shore territories, to the Republic of the Philippine Islands, and to foreign countries. All save 1.36% of the so-called foreign allotment goes to Cuba; and as estimated continental demand rises or falls, its quota—which is the chief element of flexibility in the scheme—is increased or diminished. Provision is also made for transferring parts of the quota from American territories which can not fill them to other American territories which can make up the deficit. In effect the Act lifts the area specified out of the world market on to a "plateau" and there insulates it against the impact of untamed economic forces. By fencing off excess capacity and by equating supply to demand, the Act seeks to secure for the industry the order and the balance of interests which it is the very purpose of the open market to effect.

The administrative process may not be the ideal instrument for such a task—but it has flexibility, lends itself to trial and error, and allows correction of flagrant mistakes. And, to insure that quotas meet the tests of fairness, economy and equity specified by the Congress, access to the courts is left open to all interested parties there to seek review of the orders of the Secretary.[63] Here regulation has been invoked to protect the host of helpless people engaged in the production of raw sugar against the impact of a needless disorder. The case of raw sugar falls squarely within the rationale of the use of the police power to abridge liberty of contract.[64]

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[62] Act, Section 202, 204, Appendix C, pp. 129-131, below.

[63] Section 205(b) and (d) of the Act, Appendix C, pp. 132, 133.

[64] In the international field, where the source of supply is in one country or countries, and the principal consumers in another country or countries, the same rationale supports resort to regulation, often by international agreement, of staple crops or in extractive industries. The dominant examples are coffee, rubber, mercury, and tin.

3. *The Accused Section Is Not an Integral Part of the Sugar Act, Draws No Support from the Rationale Which Sustains That Act, and Lacks Justification as An Exception to the General Rule of a Person's Liberty to and within His Trade.*

It is freely admitted by the Government of Puerto Rico that, as respects raw sugar, the Congress was within its power in passing the Act. Moreover, it is at least possible to hypothecate—even though it may be impossible to find—a situation which would justify the Congress in setting up a non-discriminatory system for refined sugar. But the point is that, in respect to refined, such a situation does not exist, the legislative rationale which justifies the control of raw does not carry over, and the Congress in fact has established no such system of quotas. Here the circumstances which would warrant resort to the police power do not exist. Section 207(b) is not in intent, character, or content a system of regulation for refined sugar.

The portions of the Act concerned with raw sugar are an entity. They constitute a complete scheme for the allocation among the named political units of the sugar to be marketed and consumed within the Continental United States. No provision in respect to refined sugar is necessary either to round out this system or to implement it. The reasons which make necessary a scheme of control for raw sugar do not even suggest the regulation of refined. In the system of allocation for raw, the total amount to be marketed has already been adjusted to consumption needs. Since demand and supply have been equalized, the situation is quite ideal for the operation of competitive forces. There is no need for further regulation to supplant or to supplement the open market. The excess capacity which with insistent drive is forever disorganizing the market has been hedged off by the controls imposed upon raw sugar. This excess capacity cannot break through that barrier to wreck the market for refined. So long as the supply of raw

sugar is limited, an excess in refining capacity—however inconvenient to the coast refiners—cannot generate an excess supply of refined,[65] which can break, disturb or even affect price.[66]

Nor is a system of quotas for refined necessary as an instrument of industrial stability. The refingrs are a small, compact, highly organized group, not like the growers so numerous and widely scattered as to be incapable of concerted action. No government interference is necessary to lift them to "that equality of position in which freedom of contract begins." Instead their small numbers threaten rather a unity in action and a relaxation by mutual consent of the severities of competition—an indulgence in unlawful behavior of which in the past they cannot be said to have been entirely innocent.[67] Here it is of note that, although an allocation of the 126,033 tons of refined allowed to Puerto Rico is annually decreed by the Secretary, no allocation in respect to the more than four million tons reserved to the coast refiners has ever been made. Such prorations are decreed when "necessary to assure an orderly or adequate flow" or "to prevent disorderly marketing".[68] The clear inference is that, whereas competition holds sway among the insular refiners, the coast refiners—without benefit of any Secretary's mandate—are quite able to maintain orderly marketing. Even if the items of Section 207 were rounded

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[65] It was in the Court below argued by the coast refiners that the accused section is justified as a remedy for the excess capacity in the refining branch of the industry. No case was cited—and the Government of Puerto Rico has found none—in which the relief of excess capacity in a processing or manufacturing industry has been held to be a proper exercise of the police power. If there were such a legislative power, the refining branch of the sugar industry would be one of the least appropriate fields for its exercise. For the number of the members of the industry is small; the total number of tons annually to be refined is fixed; and refining presents one of the easiest of situations in which capacity for mainland consumption can be brought into line with demand. But even if legislative power could lawfully be used for such a purpose, the section would still stand condemned. For it does nothing to relieve excess capacity of refiners operating in Puerto Rico and upon the island it arrests the growth of a natural industry.

[66] In fact here the threat to the public is quite the reverse. The refiners, having only a fixed amount of raw to process, may curtail operations or withhold supply to drive price up.

[67] *Sugar Institute* v. *U. S.*, 297 U. S. 553, 56 S. Ct. 629.

[68] Section 205(a) of the Act. Appendix C, p. 132, below.

out into a complete system of allocation for refined sugar, it would find no support in the rationale which sustains the raw sugar provisions of the Act.

But the Congress has not imposed—it has not attempted to impose—a system of allocation upon refined sugar.[69] All that Section 207 does is rigidly to limit the proportions of the quotas assigned to Cuba, Hawaii, Puerto Rico, the Virgin Islands and the Republic of the Philippine Islands which may be filled with refined sugar. It can not be contended that the accused section constitutes a scheme of allocation for refined. To reach such a conclusion one must subtract the sum of the off-shore maxima for refined from the total amount which is to be marketed within the Continental United States. The arithmetic may be valid; but such an exercise does not reveal a system of allocation. The remainder so found is not by Congress broken down between the beet and the cane areas on the mainland or between the Gulf, Atlantic and Pacific Refineries. In downright fact, no market quota of refined sugar is assigned to Puerto Rico or to any other off-shore territory. The figures given—126,033 short tons for Puerto Rico—are not quotas, but maximum limitations upon the amounts which Puerto Rico and the others are permitted to market upon the mainland. Puerto Rico may fall far short of this figure; it may market no refined sugar whatsoever upon the continent; but it must not exceed this figure. Nor are the coast refiners limited to the total number of tons needed for consumption within the Continental United States minus the sum of so-called allocations to off-shore refiners. They may

[69] The holding in *Gay Union Corporation, Inc. v. Wallace*, 112 F. (2d) 192, gives no support to the contention that the Act sets up a quota system for refining. In this case the plaintiff, a continental refiner, insisting that without the security which a quota would offer, he could not afford to engage in the business, demanded an order to the Secretary compelling the assignment of a quota to him. He wished to escape the competitive struggle and to be vested with an equity in the market; by Judge Vinson, speaking for the Court of Appeals of the District of Columbia, his prayer was denied. The separation of the raw from the refined provisions of the Act was not before it; and accordingly the court made no ruling upon such a discrimination as is presented by Section 207(b). It merely treated the Act as valid, as a regulation of the continental market.

compete for the business of processing every ton of raw sugar which may lawfully be brought to the mainland.

What in fact Section 207 does is to set up competitive zones. Thus the coast refiners may compete for the business of refining every ton of sugar which lawfully may be marketed within the continental United States, whether it be produced on the mainland or off-shore. But the refiners in the several off-shore territories are not allowed to compete for the business of refining sugar grown on the mainland. Nor can they compete for more than a fraction of the business of refining the sugar grown within their respective territories. The Puerto Rican refiners not only have to surrender more than five-sixths of the sugar grown on the island, but also in respect to the less than one-sixth left, they have to compete for the business with the coast refiners. Imagination cannot pick out the outlines of a quota system in so discriminatory an arrangement.

In behalf of the accused section, two contentions may be put forward, neither of which will bear scrutiny. The first rests upon the premise that the maxima assigned to off-shore territories are market quotas. This premise, resting upon sheer assumption, finds no support in fact or analysis. It may well be that Puerto Rico markets on the mainland the maximum amount permitted. If so, this is only because its refiners—made alert by having to compete—have been able to take the maximum business they are allowed away from the coast refiners. It may even happen that, once the legislation barrier set against them is removed, the insular refiners will be able to capture a part of the insular production now processed by the coast refiners. If so, the result will come, not by vesting the insular refiners with a privilege, but only because through greater efficiency they were able to capture the business in the good old American way.

It might even come about, as a result of the removal of the restriction, that a part—even the major part—of the business of refining Puerto Rican tonnage would be trans-

ferred from mainland to off shore. Such a shift in industrial base is in accord with all our traditions and is not to be viewed with alarm. Ours is a highly dynamic economy; the progress of the useful arts constantly creates new opportunities. Our industrial system must be kept mobile enough to seize these opportunities. Particular industries are to be carried on where conditions are most favorable to efficiency and low prices are to be found. It is mobility, directed by competition towards the new and greater chance which is the first law of industrial growth.

The second contention, likewise resting upon an infirm foundation, is that the system of allocation—which does not exist—is fair. Thus it is argued that the 126,033 short tons imposed as a limit represents the maximum number of tons marketed on the mainland by Puerto Rican refiners in any year before a regulatory system was imposed upon raw sugar. It may be asserted that it is just and right to say to Puerto Rico, "In the years before the Jones-Costigan Act was passed, you were free to refine as much sugar as you could secure. In those days no legislative mandate abridged or denied the ancient liberty of that trade. It is true that in 1936, that liberty was curtailed—but that had to do only with the opportunity to expand the business. The abridgement of an established civil right was not made retroactive. You are now allowed to market on the mainland the maximum the infant industry had marketed there when the trade was stabilized—that is, if you can hold the business against the competition of the coast refiners. So, as of the year 1937 your right to refine is frozen."

4. *The General Rule of Uniformity Can Not Be Strictly Applied Amid the Diversity of Our Industrial System; But in Departures From It the Congress Is Endowed With No Authority to Discriminate Between Groups of Citizens, or to Dispense Its Favors and Penalties at Its Pleasure.*

In spite of—or perhaps because of—its *ad-hoc* approach,

this Court has rather consistently recognized the complexity and diversity of the national economy. It has noted that whereas one industry might safely be left to the market, there was a "felt need" for regulation in respect to another. It has also observed that because of differences in structure, the patterns of trade practice, the rapid or slow advance of technology, the distinct offices to be performed, a single strait-jacket of public control could not be imposed upon all regulated industries. It likewise has been quick to discover that an industry contains unlike business units which operate under varied conditions, and that any legislative design—without a sacrifice of fundamental fairness—must be flexible in its application and capable of accommodation to distinct situations.[70]

The flexibility of industrial equality before the law has often been stated by this Court. And just as often the limits within which the legislature may depart from the rule of uniformity have been made clear. The leading case in this domain is *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505. There the Court held that " . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . . The courts are without power either to declare such policy, or when it is declared by the legislature, to overrule it". (*Ibid.* 537.) The ruling thus stated is self-limiting. It is a policy, not a discriminatory scheme, which the legislature is free to adopt; its proper objective is not privilege, but the "public welfare"; its instruments must be "reasonably" adapted to serve the chosen ends. But such indulgence is in no sense a waiver of fundamentals. For the due process clause demands that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (*Ibid.* 525.)

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[70] " . . . a regulation valid for one sort of business, or in given circumstances may be invalid for another sort, or for the same business under other circumstances, because the reasonableness . . . of each regulation depends on the relevant facts." *Nebbia* v. *People of New York*, 291 U. S. 502, 525, 54 S. Ct. 505, 511.

The rule of uniformity—and lawful departure therefrom—was thoroughly considered in the decision upon the validity of the Tobacco Inspection Act, *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379. There, the contention for the invalidity of the statute was, according to the Court, a "mere lack of uniformity in the exercise of the commerce power." To this contention the reply was that "the Congress may exercise its discretion in the use of the power" and "may choose the commodities and places to which its regulations apply." (*Ibid.* 14.) But the Court was careful to point out that the very statute which "defines the policy of Congress . . . establishes standards within the framework of which the administrative agent is to supply the details." It is true, as the Court remarked, that "the making of uniform rules would impose a limitation which the Constitution does not prescribe." But note that the departure from uniformity is to be tolerated on the level of "rules", not of intent or policy; and that, if Section 207(b) is severable from the Sugar Act, the condemnation of "contesting a regulation" has no application and Mr. Chief Justice Hughes, speaking for the Court, readily admits that "there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment" (*Ibid.* 14).[71]

It is, however, in *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453, that the issue is put beyond peradventure. There the Court was confronted with a legislative mandate, putting a floor under the retail price of milk and permitting independents to sell at one cent less than the minimum price. Upon the validity of the excep-

[71] Nor does *Wickard* v. *Filburn*, 317 U. S. 111, 63 S. Ct. 82, give support to a power in Congress to enact such a measure as Section 207(b). That case had to do with the challenge of the second Agricultural Adjustment Act as it related to the production of wheat. This Act, setting the pattern of control for the staples, is a regulation of the market for the raw, not the processed, commodity. The function of the processor in the operation of the Act is purely instrumental. Mr. Justice Jackson points out, a proposition not to be disputed, that in operation the Act may fail to do justice in the individual instance. But this is not to be read as a sanction for arbitrary inequalities between similarly situated groups in the same industry.

tion, the justices divided five to four. Mr. Justice McReynolds, for the minority, was of opinion that the lower price allowed the small companies was a discrimination without warrant in the law. Mr. Justice Roberts for the majority, held that the one-cent differential was essential to compensate for the advantage which the big companies enjoyed in the consumer acceptance accorded to advertised brands. Thus the issue upon which the Court divided was a question of fact—whether or not the one-cent differential was a special privilege. The majority was as insistent as the minority that a departure from uniformity, induced by practical reasons, must stop short of discrimination. The answer is the more certain, since the one-cent differential had been established "by the laws of trade or industry", and the legislature took care not to upset a natural balance.[72] In a word the very purpose of "the expediency" was that of "attaining equality of opportunity" between the two competing groups.

The accused section of the Act stands condemned by these and other authorities. It is not justified as an attempt either to maintain a balance which a functional competition had established, or to correct an unbalance brought into being by a functionless competition. It is not an accommodation of general standards to the varied detail of an industry in operation. Its departure from the constitutional guarantee of equal protection transcends mere lack of uniformity and becomes downright discrimination. It has in no way been shown to serve a public purpose. To sanction the accused section would be to go far beyond any tolerance which heretofore this Court has been willing to accord to an arbitrary act of the Congress.

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[72] "There was a plain reason for the classification . . . it was that there had resulted a balance between that advantage and the resulting disadvantage to the unadvertised dealer, a balance maintained by a price differential. To attempt to maintain that balance was to strive for equality of treatment, equality of burden, not to create inequality . . . Where, as here, there is recognition of an existing status and an attempt to equate the incidence of the statute in accordance with it, we find a compliance with, rather than a disregard of, the constitutional guarantee of equal protection." *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505.

5. *The Real Purpose of the Accused Section, Unauthorized by the Constitution, Is to Confer a Privilege Upon the Coast Refiners at the Expense of the Refiners of Puerto Rico.*

The system of allocation for refined sugar cannot be fair, when there is no system of allocation. It cannot accord equity to Puerto Rico when it arrests the growth of a natural and important industry. The provision in question cannot be justified as an expression of public policy. In no wise does it serve the consumer. The taste, quality, composition, specific gravity, adaptation to use, is in no way affected by the place of processing. No interest of the consumer is involved. Nor can an argument in respect to volume of employment be held to be in point. Section 207 (b) does not and in itself cannot be made either to increase or to decrease the number of laborers gainfully employed in refining. If, as may be insisted, it secures employment to mainland workers, it denies an equal volume of employment to insular workers. Given the state of the art, the total demand for labor remains the same. Nor as between island and continent, is it possible to argue that the provision creates a new channel for capital. It is impossible to invoke the public interest in support of the accused provision.

In fact the accused section is exactly what it professes to be—a legislative mandate abridging the business opportunities of Puerto Rican refiners to grant market rights to the mainland refiners. It is a bald attempt to employ legislation to arrest a competitive struggle in order that benefits may be conferred upon favored persons. It is a vesting of the continental refiners with the exclusive right of refining all the sugar marketed in the continental United States except for small doles for which overseas territories are permitted to compete. Section 207, in violation alike of our code of law and of our system of free enterprise, attempts to establish an arbitrary pattern of property rights in the

market. A small equity in the mainland market is granted to each off-shore territory—that is, if it can win and hold it. A property right in the rest of the market is accorded to the coast refiners—without any necessity on their part to win or to hold it. In respect to raw sugar, where regulation is necessary, the law prescribes a mechanism for the periodical adjustment of quotas to changing circumstances. In respect to refined, where no case exists for regulation, the market maxima set against off-shore territories are fixed against the impact of change, enterprise and progress.

It is of note that by the Congress no such penalty as that sanctioned by Section 207(b) has ever been imposed upon the economy of a state. The invitation to such an imposition is great and continuous. Textile mills are set up in the State of Georgia; is the Congress to be invoked to arrest the infant industry in order that New England operators may be guaranteed the markets which they have enjoyed in the past? In the State of Illinois, a couple of automobile factories spring up. Is national legislation to be invoked to make sure that the market provinces of three big Michigan corporations are not disturbed? The State of Pennsylvania once boasted a great petroleum industry. If the Congress could have been persuaded, would it have been lawful to use a national mandate to prevent Texas wells from "coming in"? Such laws are as unlikely and as unprecedented as they are unauthorized by the Constitution. Yet, the Congress, by arbitrary fiat has abridged the liberty of persons engaged in the trade of sugar refining who happen to carry on their business in Puerto Rico. And, the Congress, by the same arbitrary legislative fiat, has vested with a special privilege persons in the sugar refining trade who do business on the mainland.

In the Constitution of the United States there is no provision for a first and for a second-class citizenship. Like the people of Georgia, Illinois and Texas, the citizens of Puerto Rico are citizens of the United States. The Organic Act contains its bill of rights; and by an amendment there-

to—80th Cong., 1st Sess., Aug. 5, 1947, Pub. 362—they are endowed with all the rights and privileges, all the liberties and immunities of citizens of the several states. Yet the Congress has abridged the liberty of the trade of United States citizens living in Puerto Rico solely to confer a benefit upon citizens carrying on their business on the mainland.

C. The Accused Section of the Act Derives No Sanction, Justification or Excuse From the Power Conferred Upon the Congress to Regulate the Territories.

In an attempt to avoid the demand for equality before the law, the proponents of the accused section seek to shift the battle front. It was argued below—and doubtless will be contended here—that in respect to Puerto Rico a power inheres in the Congress which does not obtain in respect to a state of the Union. Accordingly they point to "the territory clause" and insist that, in respect to its orbit this clause endows the Congress with "plenary power".[73]

To make such a shift is to misstate the issue. In no wise is the accused section—or even the Act—a rule or regulation for the territory of Puerto Rico. In no way is the government of Puerto Rico, its various agencies and corporations, or its officials involved in the administration of its provisions. The statute upon which it is grafted is entitled "an Act to regulate commerce among the several states, with the Territories and possessions of the United States and with foreign countries [74] . . . and for other purposes". The Act in general is a prescription of the conditions under which sugar may be marketed within the con-

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[73] A plenary power is one which may be exercised to the full extent or in its plenitude. It is not an absolute, unlimited or irresponsible power. To call a power plenary is not to define its content or to mark out its limits. See any standard secular or legal dictionary.

[74] The title or preamble continues, ". . . to promote the welfare of consumers of sugars and of those engaged in the domestic sugar producing industry, to promote the export trade of the United States, and for other purposes." Note the choice of the term "sugar producing industry"—not producing and processing, indicating that the Act is a farm relief measure. Note also that, inasmuch as they are beneficiaries of the Act as regulating the production of raw sugar, Hawaii and Puerto Rico are here accounted "domestic".

tinental United States and a specification of the amounts which the several sugar-producing areas—mainland and off-shore—may market.

As a regulation of commerce, both the Act and the accused section invite scrutiny. The entrance of sugar from the cane lands and beet fields on the mainland into the continental market clearly involves "commerce among the several states". The flow of sugar from Cuba—and now from the Philippine Islands—is just as clearly within foreign commerce. The movement from the Virgin Islands is from a possession of the United States. The streams from Hawaii and Puerto Rico to the mainland are, in the words of the title of the Act, "commerce . . . with the Territories of the United States." It has been held—the ruling was limited to the Philippines before independence was fully effected—that there could be imports into the United States whose point of origin was not a foreign country.[75] But as between "foreign commerce" and "commerce among the several states," the Constitution recognizes no intermediate category. Accordingly it is not enough for the champions of the accused section to invoke "the territory clause." They must go further and show that in respect to commerce between the states and an organized territory, the Congress possesses an authority, free from constitutional limitations, which it does not possess in respect to commerce among the several states.

As for the accused section, the power of the Congress over commerce varies with the points from which sugars are shipped.[76] Here section 207 (e), limiting the portion of

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[75] *Hooven and Allison Company* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870.

[76] Sec. 207. (a) Not more than twenty-nine thousand six hundred and sixteen short tons, raw value, of the quota for Hawaii for any calendar year may be filled by direct-consumption sugar.

(b) Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar.

(c) None of the quota for the Virgin Islands for any calendar year may be filled by direct-consumption sugar.

(d) Not more than fifty-six thousand short tons of sugar of the quota for the Republic of the Philippines for any calendar year may be filled by direct-consumption sugar as specified in section 211 of the Philippine Trade Act of 1946.

the quota for Cuba which may be filled with direct consumption sugar, as well as section 207(d), imposing a similar restriction upon the Philippine Islands, are manifestly regulation of foreign commerce. Sections 207(a) and 207(b), imposing similar limitations, with Hawaii and Puerto Rico as points of origin, are regulations of commerce in all relevant respects domestic in character. Like Hawaii, Puerto Rico has been fully incorporated into the customs union, or national economy, known as the United States of America.[76a] And, like Hawaii, its citizens have been endowed with all the rights and liberties of "citizens of a State" in the Union.[76b] The issue, therefore, involving the commerce clause, imposes upon the champions of the accused section the necessity of justifying alike the denial to Puerto Rico of its rights within our customs union, and the legislative invasion of liberties of its citizens identical with those of citizens of the several states.

It is, however, undoubtedly true that an Act of the Congress may be an expression of one, of two, or of a number of distinct powers; and the statute must meet the limitation of all of them. It is likewise beyond doubt that in the accused section, citizens of a territory are specified as subjects of congressional disfavor. The argument concerning the power of Congress over the territories must, therefore, be fairly met.

1. *The Accused Section Is Not Sanctioned, Justified or Excused by the Power Over the Territories as Delegated by the Constitution to the Congress.*

The purpose in a shift of the battle-front from the commerce to the territory clause is obvious. The cases—as recited below—sometimes use the word "plenary"; and if plenary can be read as absolute, unlimited, despotic, if the Congress has been endowed with so irresponsible an authority, and if for its acts respecting a territory it does not

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[76a] First Organic Act, May 1, 1900 (Foraker Act), *supra*.
[76b] Second Organic Act, March 2, 1917 (Jones Act), *supra*.

have to "answer in any other place"—a host of embarrassing questions are avoided. It is then not necessary to consider the extent of its power; to have regard for its encroachment upon the liberties of citizens; to inquire into its intent in selecting the citizens of Puerto Rico as objects of its disfavor; or even to seek justification for the restrictions on personal liberty in a public purpose. All the issues in the case are swept away by a single bold assumption.

The frailties of the argument are visible. The accused section takes effect upon persons and citizens, not upon a territory. Even if, accepting the unreal as the actual, it is read as affecting territory, the overwhelming weight of legal authority, as the paragraphs below will demonstrate, is a denial of its validity. The very concept of an absolute, unlimited, irresponsible, and unanswerable authority, which underlies the argument, is contrary alike to the spirit of the Constitution, the character of our system of popular government, and the historic treatment of our territories.

The words in which are embodied the power delegated to the Congress over the territories are clear enough. This grant is not set down in Article I, Section 8, which enumerates the powers lawfully to be exercised by the Congress. Instead it appears as a part of Section 3 of Article IV, the general concern of which is the place of the states in the federal union.[77] The relevant clause in Section 3 reads, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Ter-

[77] The position of the power in question in Article IV is not without significance. Section 1 requires each state to give "full faith and credit" to the public acts of every other state. Section 2 extends to the citizens of each state "the privileges and immunities of the citizens of the several states." By Section 4 the United States guarantees "to every state in the Union a republican form of government." The first paragraph of Section 3 provides for the admission by the Congress of new states into the Union. And the second paragraph of Section 3 recites the grant of power to the Congress over "the territory and property" of the United States. The clear presumption is the temporary character of territorial government and the eventual admission of the territory into the federal union. A territory is, in fact, a state in posse. As an entity the several sections of Article IV are all directed towards the formation of a more perfect union.

ritory or other Property belonging to the United States." A mere reading reveals how far this language falls short of the absolute power which it is claimed to confer. The territory is lumped in with "other property" of the United States; it can easily be read as land empty of people or scantily settled awaiting legislative disposition or destiny. There is within its language no reference to an organized territory, to its body politic, to any group of subjects, persons or citizens. In form the words are devoid of any reference to a political order or an operating government.

But, such matters apart, the language on its face contains a definite limitation upon the power of the Congress. It does not make the power granted absolute or sovereign; instead it limits it to the making of "rules and regulations." Although, in their desire to provide for contingencies which they could not foresee, it was the habit of the Fathers to employ broad terms, they were too precise in their language to confuse words standing for greater and lesser authority. The words "rules and regulations" were deliberately chosen; in the diction of the Constitution they are always employed in a grant of limited and specified power, never to confer an absolute and uncontrolled authority to legislate. This is borne out by usage throughout the document in respect to rules and regulations. Note, for example, the particular power of the Congress "to make rules for the government and regulation of the land and naval forces of the United States" (Art. I, Sec. 8); the specific power to "regulate commerce with foreign nations and among the several states" (Art. I, Sec. 8); the concrete authority "to establish a uniform rule of naturalization" (Art. I, Sec. 8); the special power "to coin money and regulate the value thereof" (Art. I, Sec. 8). It is not difficult, in this restricted meaning, to find the Congress possessed of adequate power to prescribe rules and regulations in respect to a territory, such as Puerto Rico. For there the ancient liberties of its citizens have been recognized, a government has been organized, a system of law has been established; and the task

of rules and regulations has come to be the adaptation of our political system and our legal code to the status of the island and its citizens. The language of the clause does not convey, it does not even suggest, the grant to the Congress of a general and unlimited power to do as it will with the territories.

Even if the words "rules and regulations" are to be accorded the fullness of meaning claimed for them, the case is not made out. The Constitution specifies that such rules and regulations must be "needful". The word "needful" is left unrelated, but the whole context suggests that the need is that of the territory and its people. There is neither word nor implication to suggest—much less to dictate—that the "need" of a group on the continent, in this instance the small group of sugar refiners, is to be used as a sanction for an irresponsible regulation imposed upon an organized territory. Above all, the language employed gives no warrant by text or inference for assuming a power in the Congress to abridge the liberties of citizens of the United States who happen to live or to do business in the territories to the sole advantage of citizens of the United States living on the mainland. It is only reasonable to assume that the Fathers of the Constitution knew how to say what they meant. If by this statement they had intended to delegate to the Congress the power, at its pleasure, to invade the rights of the citizens of the United States resident within its territories, they would doubtless have known how to convey their meaning.

2. ***The Ordinance of 1787 for the Good Government of the Northwest Territory, Which Throughout the Nation's History Has Served as the Model in Formulating a Political Order for a Territory, Gives No Support to the Proposition That the Power of the Congress Over the Territories Is Absolute and Irresponsible.***

It happens that there is a gloss on the provision in the Constitution granting to the Congress the power "to make

needful . . . regulations . . . in regard to the territory . . . of the United States" which is alike contemporary and authoritative. On the 13th of July, 1787, while the Fathers of the Constitution were in session, there was enacted "by the United States in Congress assembled" an "Ordinance for the government of the territory of the United States northwest of the river Ohio." The two bodies—the Continental Congress and the Constitutional Convention—were in session at the same time, the one in New York, the other in Philadelphia; the two bodies had a number of members in common; [78] there was constant traveling by members between the two places.[79] The Ordinance gives unimpeachable evidence to the meaning of the provision in the Constitution.

The Ordinance [80] in terms which have endured to this day spells out the limits of congressional power. It allows the Congress for an interim period, until civil government can be established, a larger freedom in the government of the territory than thereafter it was to enjoy. The mark of the social revolution which attended the resort to arms to make secure the newly declared independence finds expression in the outlawing alike of the rule of primogeniture (Section 2) and in the prohibition of a state religion (Section 3). It projects "the common law", with all the rights and liberties which attend it, into the territory (Articles I and II). It provides the time-honored resort to court for the redress of wrongs. It guards persons, whether citizens or aliens, against the well-known abuses of legal process (Article II). It secures to the inhabitants of the territory the ancient rights of habeas corpus, trial by jury, and the like (Article II). It accepts for the territory "such laws of the original states as may be necessary and best suited to the circumstances of the district" (Section 5). It provides for a modification of these laws by the general assem-

[78] Among them Abraham Yates, Rufus King, and Roger Sherman.

[79] A copy of the ordinance as enacted was delivered to one George Washington, the presiding officer of the Conventions on July 15, 1787, by the hand of Richard Henry Lee, a member of the Continental Congress.

[80] Ordinance of July 1, 1787, *Formation of the Union of the American States* (69th Cong., 1st Sess., House Document No. 398) 47-54.

bly of the territory to meet distinctive circumstances then present or later to be encountered (Section 5). It limits the power of the Governor, who is to be appointed by the Congress, as self-government is firmly established.

The Ordinance—conforming to the accepted political theory of the day—is written in the form of a social compact between the Congress and the people of the territory (Section 14). It rests squarely upon the principle that a just government derives from the consent of the governed. So insistent is the document upon "the fundamental principles of civil and religious liberty" which "form the basis of these republics, their laws and constitutions," that it seeks "forever hereafter" to "fix and establish those principles" as "the basis of all laws, constitutions and governments which are to be erected in the territory". The constitution and government of all states hereafter to be formed within this territory are to be republican in character (Article V). The highways of the territory are to be "forever free, as well to the inhabitants of the said territory as to the citizens of the United States" (Article IV). And "in no case shall non-resident proprietors be taxed higher than residents" (Article IV). In fact all discrimination between citizens living in the territory and in any one of "the original states" is broken down. Directly in point there, "no man shall be deprived of his liberty or property but by the judgment of his peers and the law of the land" (Article II). Most important of all, the Ordinance directs government towards the welfare of the people, their progress, and the eventual resolution of the territory into states of the Union (Section 13).

In time it is a far call from 1787 to 1949; in securing the human liberties of the people in the territories the Northwest Ordinance and the Organic Act for Puerto Rico are near together. There has been no jump across sixteen decades from the one document to the other. A series of intermediate enactments, establishing governments for various territories, fill in the intervening time.

Citations to a number of these acts of Congress which are typical are set down on the margin.[81] Into the reiterated detail of their provisions it would be tedious here to go. The continuity of "principles", and the abiding character of the rights and liberties which it is sought to protect under a constitutional government, is attested by all that is common to the Ordinance and the Organic Act. That there was no direct copying is evident; that the Organic Act is the last in a series of mutations on the enduring theme of good government for a territory is equally evident. As an epitome of our territorial government note the reiterated theme of an equality before the law which is not to be stayed by difference in race, religion or culture or by the fact of annexation through conquest or cession. The Northwest Territory consisted of lands which largely passed to the United States by conquest and cession; Puerto Rico came into our Federal Union through conquest and cession. The Ordinance provides that "in their property, rights and liberty", the Indians who from days of old had possessed the land should never be "invaded or disturbed." The Organic Act provides that all who had been born in Puerto Rico under Spanish rule, as well as their children, are to "enjoy all the rights possessed by natives living within the several states." The Ordinance was "done . . . in the year . . . of Independence the twelfth." Can it be that the rights and liberties which it proclaims had been lost in the year of Independence one hundred and seventy-fourth?

3. *The Traditional Interpretation of the Clause by the Courts Give No Support to the Proposition That at Its Pleasure the Congress May Deny or Abridge the Liberties of Citizens of the United States Living or Doing Business in a Territory.*

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[81] Alabama—March 3, 1817, C. 56, 3 Stat. 371, April 20, 1818, C. 127, 3 Stat. 468; Alaska—May 17, 1884, C. 53, 38, 23 Stat. 24, June 6, 1900, C. 786, Title I, 31 Stat. 321; Arizona—Feb. 24, 1863, C. 56, 12 Stat. 664; Iowa—June 12, 1838, C. 96, 5 Stat. 235; Indiana—May 7, 1800, C. 41, 2 Stat. 58; Mississippi—April 7, 1798, C. 28, 1 Stat. 549; Ohio—April 7, 1789, C. 8, 1 Stat. 50.

The Northwest Ordinance has set the pattern for the government of a territory. The Constitution has appointed orbits to every branch of the federal government. And just as distinct, even though at times overlapping, tasks are entrusted to its several departments, so the area within which each agency of government operates is defined. None of the powers delegated by the people to the Congress through Article I, Section 8 of the Constitution has been held to be absolute.[82] It is hardly plausible that a grant of power in Article IV, Section 3—itself set down in conditional terms—should be subject to a type of interpretation elsewhere unknown to our fundamental instrument of government. That the Congress is the supreme legislature for Puerto Rico, and that its Acts take precedence over the mandates of the local legislature is elementary. But if the Congress has the highest power, it does not follow that it has absolute power. If it possesses power in fullness or plenitude, it does not follow that the power is unlimited. In fact the courts have never held the grant of power to the Congress over the territory of the United States to lie outside the Constitution.

The argument for the absolute power of the Congress has again and again been presented to the courts. Its principal frailties are that it deals with a territory as if it were a "property of the United States" and that it disregards as irrelevant the rights and liberties of persons, citizens of the United States, who happen to reside or to do business there. In the ruling case of *Scott* v. *Sanford*,[83] 19 Howard

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[82] It seems unnecessary here to survey in detail so elementary a subject as the standards by which and the limits within which the Congress is to exercise the power conferred upon it by the commerce clause.

[83] The case of *Scott* v. *Sanford*, *supra*, known to the history books as "the Dred Scott case", has, of course been subject to great controversy. Here two characteristics of the opinions are to be briefly noted. The first is that holdings by the several justices who made up the majority, whether explicit or implicit, to the effect that human beings can become objects of property, are obsolete. But, with this admission, the argument of the court to the effect that a citizen of the United States, who goes to a territory, or there engages in business, is not thereby deprived either of his liberty or of his property is as valid today as it has been down the decades.

The second is that, in view of the diverse expression of views by the nine justices, there is no "opinion of the court". This difficulty is fully met by

393, 15 L. Ed. 691, the errant contention is met with complete refutation. It is said, *ibid.*, p. 735, "there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all". Such an argument attempts to turn "the territory clause" into a forfeiture by some citizens of that equality of rights and immunities[84] "which belongs to every citizen of the United States".

A shift from territory as land to its inhabitants as persons and citizens[85] subdues dictatorial into constitutional authority. The authority of the Congress in respect to a territory can never be "a mere discretionary power under our Constitution and form of government". The Federal Government enters into possession of a territory "in the character impressed upon it by those who created it. It enters upon it with its powers over the citizens strictly defined and limited by the Constitution from which it derives its own existence and by virtue of which alone it continues to exist and act as a government". It "cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it." Nor can it "cre-

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two devices: namely, that that which is concurred in by five justices is "the opinion of the court", and that, however diverse the original opinions, the citation by later benches who have spoken for the Supreme Court make such utterance canonical. The passages quoted from the opinion of Mr. Chief Justice Taney have been carefully chosen to meet both of these tests. The language quoted has been frequently cited in later cases.

[84] It has sometimes been argued that the Fifth Amendment contains no equal protection clause. The contention raises a question of rhetoric, not of substance. As discussed elsewhere in this brief, a man's trade is alike a "liberty" and a "property". The police power may be used, when necessary to abridge the liberties or the property rights of persons similarly situated. But to abridge the liberties or property rights of some, and not of others, among those who are in a like situation is a deprivation of liberty or property without due process of law. The matter is too elementary to require detailed exposition.

[85] In a forthcoming treatise on the writing and ratification of the Constitution, Professor William Crosky, of the Law School of the University of Chicago, sets down a long chapter on "the Language of the Fathers." In it among other things, he points out the use of single proper nouns with plural verbs. "Virginia think", "Pennsylvania oppose", "Massachusetts concur" can have meaning only if the names of the states are read as standing for the people, or the organized communities, thereof.

ate for itself a new character, separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution". *Ibid.*, p. 719. The "power over persons and property"[86] here contended for, "are not only not granted to Congress, but are in express terms denied", *Ibid.*, p. 719. This prohibition against the taking of "life, liberty and property" is not "confined to the States, but the words are general and extend to the whole territory over which the Constitution gives . . . power to legislate . . . It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing as citizens of the States and guards them as firmly and plainly against any inroads which the general government might attempt."[87] *Ibid.*, p 735. "Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of citizens of the United States. And to clinch the argument the court sets down as even

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[86] The expression "life, liberty, and property" has become a term of art. It is a general phrase whose meaning, like that of "last clear chance", "restraint of trade", and "due process of law", is not to be discovered by looking up the several words in the dictionary. The several words do not possess mutually exclusive meanings. The phrase is rather a comprehensive term for all the rights and liberties reserved by and to individuals against their government. Note the older form of "lives, liberties, and estates" as used in the Petition and the Bill of Rights. There the word "estate" is employed not as currently used in "debtor's estate" and "decedent's estate", but as standing for one's station in life, with all the privileges, prerogatives, and responsibilities attaching thereto. One's estate is personal; the property—a short word for propriety—is not the estate, but the instrument for supporting the estate. Note historically in England the three estates of the lords, the clergy, and the commons. In general the estates of the members of common consisted of the wares, the facilities and the opportunities of trade. Note, too, the estates general of France and in support of the Declaration of Independence the pledge of our forefathers "to each other" of "our Lives, our Fortunes, and our sacred Honor". In the medieval scheme, rights were the rights of persons in respect to things. In the rights and liberties reserved by the people through the Constitution this usage has prevailed. A dominant and inseparable aspect of the civil rights has always been the right to economic opportunity. It is of significance that even in the days when due process rode high, it was the "liberty of contract", rather than the right of property, which the courts were so insistent to protect.

[87] Note that by the Organic Act, as amended, the rights of citizens of Puerto Rico are defined in terms of the rights of citizens of the several states.

more illogical and extravagant the power of the Congress "to establish inequalities . . . by creating privileges in one class of those citizens and by the disfranchisement of other portions or classes".

The territorial doctrine as set down in *Scott* v. *Sanford, supra,* is to be described as the judicial version of the Northwest Ordinance. In the period between the Civil and the Spanish wars that doctrine was in general followed by the courts. There was some dispute as to just how far the Congress could go in legislating in respect to territories, but none as to its lack of authority to invade the rights and liberties of the people living there. Thus in *Thompson* v. *State of Utah,* 170 U. S. 343, 18 S. Ct. 620, the case of *Murphy* v. *Ramsey,* 114 U. S. 15, 5 S. Ct. 747, is quoted to the effect that since "the people of the United States" are "sovereign owners of the national territory," they have supreme power over them and their "inhabitants". And, inasmuch as "in the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated", the power of the Congress is rather substantial. But the court is careful to insist that all such delegated power, however broad its scope, is subject to "such restrictions as are expressed in the Constitution or are implied in its terms." To the court the rationale is obvious; those who emigrated to this country from England brought with them, as "a birthright" that "admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power". Other cases to the same effect are: *First National Bank* v. *County of Yankton,* 101 U. S. 129, 25 L. Ed. 1046; *American Insurance Co.* v. *356 Bales of Cotton,* 1 Pet. 511, 7 L. Ed. 242; *U. S.* v. *Gratiot,* 14 Pet. 526, 10 L. Ed. 573; *Cross* v. *Harrison,* 16 How. 164, 14 L. Ed. 889.

4. *The "Insular Cases" Give No Support to the Proposition That the Power of the Congress Over a Territory Is Absolute and Irresponsible.*

The war with Spain brought with it a new climate of opinion. Talk of "the white-man's burden" and of "manifest destiny" was in the air, and an influential group of people spoke of "overseas empire". There were novel questions as to whether the provisions of our Constitution and our system of free government could be applied to peoples habituated to another culture and living at a distance from us. There was as regards overseas possessions a demand for an enlarged national authority which had never arisen in connection with contiguous territories. The logic of dominion was not clear-cut; no familiar criteria sharply separated Puerto Rico from the territories of the Northwest, Kansas, Oklahoma. Like Puerto Rico, the Northwest Territory was acquired by cession. Many a peace pipe was smoked with the Red Man to secure the opening to white settlement of Indian territory. The whole of Louisiana Territory came to us by cession. Nor was culture an adequate criterion; for at the time it was acquired the Province of Louisiana in its customs and institutions was as French as Puerto Rico was Spanish. It has often been argued that, in legislation for our insular possessions, "a reason exists"[88] which does not obtain in respect to territory contiguous to the States. It, of course, goes without saying, in respect to a territory like Puerto Rico, that "temporary expedients" may have to be employed; that, it may be necessary to "adapt" laws to local conditions; and that, because of distance, an alien culture, and a lower economic level, the process of organic linkage with the several states will have to be effected by a series of steps rather than by a single over-all act. But in bringing to pass the more perfect union it is adaptation, not sheer creation which was called for. The issue of a "plenary" or even "sovereign" power of the Congress, to the front in the newspapers and in the political campaign of 1900, in course of time reached the courts.

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[88] Dissent by Justice McReynolds in *Springer* v. *Philippine Islands*, 277 U. S. 189, 48 S. Ct. 480.

The dominant case, in respect to our insular possessions, is *Downes* v. *Bidwell*, 182 U. S. 244, 21 S. Ct. 770.[89] The case came to a hearing after the Foraker Act was passed, before it was superseded by the Organic Act of 1917, before the proclamation by the Congress of a bill of rights for Puerto Rico,[90] and before the extension of the liberties of the citizen of a state to the members of the body politic known as the People of Puerto Rico. Thus the case needs to be read in the light of the status of the island at the time. Two other requisites are essential to fathom the views of the justices and to discover the opinion of the court. The one is constantly to keep in mind the exact question which the Court was called upon to answer; the other is to remember that propositions concurred in by a majority of the court can be discovered only by a careful comparison of the several opinions. All of this means alertness, careful analysis and industry; a time-consuming process which not all who have cited *Downes* v. *Bidwell* have been willing to take. Too often—sometimes even by the courts—the hearsay of later opinions has been accepted for what the court actually ruled. Language from the opinion of Mr. Justice Brown—who, in delivering the judgment of the court, spoke only for himself—has been accepted as canonical and statements addressed to a specific issue have been read as if they were propositions of universal validity. Now and then judges who have not probed the matter for themselves have accepted as authority that which is *dicta*, often *dicta* concurred in by less than a majority. This word of caution is necessary; for the scrutiny of the justices in *Downes* v. *Bidwell* is far more searching than the "clarification" sometimes given to it by later judges.

The question presented to the Court in *Downes* v. *Bidwell* was immediate. Its concern was the validity of the third Section of the Foraker Act imposing upon merchandise imported into Puerto Rico from the United States, or into

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[89] An earlier case, *DiLima* v. *Bidwell*, 182 U. S. 1, 21 S. Ct. 743, had ruled that Puerto Rico was not "a foreign country".

[90] Organic Act of 1917, Sec. 2.

the United States from Puerto Rico, a duty of "15 per centum of the duties which are required to be levied . . . upon like articles of merchandise imported from foreign countries." The duty in question was a "temporary expedient"; the monies collected were to be covered into the treasury of Puerto Rico to defray the expenses of the insular government; the civil government of Puerto Rico, as and when constituted, was empowered to institute its own revenue system and thus to put an end to the impost. The immediate issue, upon which the court, in a division of five to four, found the tax valid, has long since passed into history. But the discussion on the power of the Congress over the territories which the case provoked has endured. It is the larger "doctrine", not the instant holding which today has significance. Because of the number of separate utterances, the precautions set down in the paragraph above are essential to a correct reading of the case.[91] It is especially necessary to see that nothing is quoted which is not concurred in by at least five of the brethren. For reading the case, a sharp eye must be kept out for the distinctive reasons recited for holding a temporary expedient valid and the appropriate limits permanently assigned to the power of the Congress over the people of the territory. It is the latter alone which is of concern here.

In the case of *Downes* v. *Bidwell*, the minority held the key position. The dissenters stood squarely for the time-honored doctrine of a limited congressional power and urged that the Congress had no authority to impose the duty. The majority, splitting three ways, used diverse intellectual routes to reach a common goal.[92] Thus it was held that "Puerto Rico is a territory appurtenant and belonging to the United States," and that, at least for the

[91] In announcing the judgment of the court, Mr. Justice Brown delivered an opinion. Mr. Justice White wrote a concurring opinion in which McKenna and Shiras, JJ., joined. Mr. Justice Gray also wrote a concurring opinion. Mr. Chief Justice Fuller, and Harlan, Brewer and Peckham, JJ., dissented.

[92] It is the case of *Downes* v. *Bidwell* which inspired Mr. Dooley to the clever and none too accurate remark that "the Supreme Court follows the illection returns."

time, it was not "a part of the United States" within the clause of the Constitution requiring that, in the exercise by the Congress of its power to levy taxes and to collect revenue, "all Taxes, Duties, Imposts and Excises shall be uniform throughout the United States." (Art. I, Sec. 8.) Note that the holding that it is not a part of the United States has reference only to the status of Puerto Rico at the moment and that it is set down only in reference to a specific clause in the Constitution.

It is true that in a technical sense, there is no opinion of the Court. But the opinion of Mr. Justice White, concurred in by Mr. Justice McKenna and Mr. Justice Shiras, has by common consent been regarded as the opinion of the Court. In respect to the immediate issue of the reasons for the validity of the tax, Mr. Justice Brown and Mr. Justice Gray speak for themselves, and Mr. Justice White's is the voice of no more than three. But, once the immediate question is left behind, his opinion is freed from all doubt. The high regard for it is accurate in respect to the disquisition upon the power of the Congress over the territories, for here a majority of his brethren concur. The four dissenters would put the propositions he states even more vigorously. And since his opinion is concurred in by two of his brothers, only Brown and Gray, J.J., are—and very dubiously—left out. Mr. Justice Brown severely limits his argument to the proposition that, as respects the requirement of uniformity in taxation, Puerto Rico was not to be treated as an organic part of the United States and Mr. Justice Gray contends only that the civil government of the United States does not extend immediately and "of its own force" to territory acquired by cession; that an act of the Congress is essential to establish the insular civil government; and that a temporary government is not subject to all the restrictions of the Constitution.

In his usual thorough and logical manner, Mr. Justice White subjects the power of the Congress over the territories to a searching inquiry. "Every function of the gov-

ernment" is "derived from the Constitution . . . whenever a power is given by the Constitution and there is a limitation imposed . . . such restriction operates and confines every action on the subject within its constitutional limits . . . this does not presuppose that the Constitution may or may not be applicable at the election of any agency of the government."

Mr. Justice White continues, "The Constitution has undoubtedy conferred on Congress the right to create such municipal organizations as it may deem best for the territories . . . whether incorporated or not . . . to give to the inhabitants as respects local government such degree of representation as may be conducive to the public well-being . . . and to change local government at discretion." But he does not confuse the power of the Congress over the form of the government with the power to invade the liberties of the people. He insists that "this . . . does not imply that the authority of Congress to govern the territories is outside of the Constitution since the right is founded on the Constitution." And, "as Congress in governing the territories is subject to the Constitution, it follows that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject." It "follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein". The Congress, it is true, has quite a latitude in respect to the "form and manner in which a conceded power may be exercised"; but there are "general prohibitions in the Constitution in favor of the liberty and property of citizens" which are "limitations which in the nature of things cannot be transcended". In this domain there is on the part of the Congress "the complete absence of power".

Mr. Justice White, reciting the authorities,[93] makes much

[93] See Debate in the United States Senate on Feb. 24, 1849, on an amendment offered by Mr. Walker extending the Constitution and certain laws of the United States to California and New Mexico. Notice Webster's position (20 Cong. Globe, App., p. 272).

of the distinction between "the two characters of restrictions" to be found in the Constitution. He insists that there must be no confusion between "those which regulate a granted power and those which withdraw all authority on a given subject." Against the contention that, admitting that such a distinction exists, it has no validity in respect to the power of the Congress over the territories, he insists that "those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status".[94] In application to the instant case, the abridgement of the rights of the people of Puerto Rico would end—as it actually did end—with cession, while the ancient rights and liberties of the people of Puerto Rico would endure until they were replaced by the richer and more secure guarantees of our Constitution.

As regards the power of the Congress over the territories, the dissenting justices are—though even more insistently—in substantial accord with Mr. Justice White. To cite a single example, the following passage from the opinion of Mr. Justice Harlan, like many others in his opinion and that of Mr. Chief Justice Fuller, might be interpolated into the White opinion without breaking the stride of the argument. In forthright terms Mr. Justice Harlan argues that the only source of legislative power is "the supreme law of the land". He points out that there are "certain prin-

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[94] To that effect he quotes Mr. Justice Field, speaking for the Supreme Court, in *Chicago, Rock Island and Pacific Ry. Co.* v. *McGlinn*, 114 U. S. 542, 5 S. Ct. 1005, to the effect that "it is a general rule of public law . . that whenever political jurisdiction and legislative power over any territory are transferred from one country to another, the municipal laws"—that is the "laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government". And, as against any peradventure, Mr. Justice Field reiterates that whereas by cession "public property passes from one government to the other . . . private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment." Mr. Justice Field goes on to insist that "all laws, ordinances and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced" and to specify that, with cession "the laws of the country in support of an established religion, or abrogation of the freedom of the press, or authorizing cruel and unusual punishments and the like would at once cease to be of obligatory force without any declaration to that effect." But "municipal laws", designed to protect the life, liberty and property of the people would remain in effect."

ciples of natural justice . . . which need no expression in constitution or statute to give them effect or to secure dependencies against legislation hostile to their real interests". Yet the Fathers of the Constitution proceeded upon the theory that "the only safe guarantee against governmental oppression was to withhold or restrict the power to oppress". Had that been their wisdom, they might have written into the Constitution a declaration that "the Constitution, laws, and treaties of the United States constituted the supreme law only in the states" and that "outside of the states the will of Congress was supreme". But the Fathers did nothing of the kind. On the contrary they made "this Constitution, and the laws of the United States which shall be made pursuant thereto, and all treaties . . . under the authority of the United States . . . the supreme law of the land." As respects the power of the Congress over the territories, "that the convention struck out the words, 'the supreme law of the several states' and inserted 'the supreme law of the land' is a fact of no little significance. The 'land' referred to manifestly embraced all the people and all the territory, whether within or without the states, over which the United States could exercise jurisdiction or authority."

In general the courts have followed the opinion of Mr. Justice White—that is of the court—in *Downes* v. *Bidwell, supra.*[94a] There has, it is true, been some confusion over the term "plenary power of Congress", and it has not been easy to understand exactly what the learned Justice meant when he admitted that Puerto Rico was not a foreign country,[95] yet insisted that "in a domestic sense Puerto Rico was a foreign country." The word "plenary" was not sharply defined; there are degrees of plenitude. And later courts have neither given to the term sharp definition nor

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[94a] For a critical survey of the series of cases see: Ramírez, Marco A. "Los casos insulares," 16 Revista Jurídica de la Universidad de Puerto Rico 121 (1946). This article is also available in English at the Harvard Law School Library, it being a LL. M. thesis submitted in 1942.

[95] *De Lima* v. *Bidwell*, 182 U. S. 1, 21 S. Ct. 743.

appointed to it well-defined limits. It seems needless to multiply the kind of citations set down in the margin.[86] It is admitted that the Congress may amend or revise territorial statutes; that it may veto Acts of territorial legislatures and may superimpose its own Acts. It is cheerfully conceded that in respect to the territories the Congress possesses a plenitude of legislative power. But all of this neither defines legislative power nor denies its constitutional limitations.

5. *The Power of the Congress to Enact the Accused Section Can Draw No Support From the Lack of the Complete Incorporation of Puerto Rico Into the Body Politic Known as the United States of America.*

The argument for the accused section shifts the battle-front from the liberties of persons to the power of the Congress over that territory. The weakness of that position suggests a retreat to a second line of defense. Hence it is argued that Puerto Rico is an "unincorporated territory" and that over such a territory there exists a larger legislative power than over a territory fully incorporated into the Union. The minor premise of fact as well as the major premise of law alike invite attack.

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[86] There is no verbal magic in the word "plenary" which provides an escape from constitutional limitations. The fullness within the limits of the power neither defines nor enlarges that power. It does not—and has not been made to—mean absolute, unlimited or irresponsible. The relevant cases give little warrant for giving such generous boundaries to the word. In the older case of *National Bank of Brunswick, Maine* v. *County of Yankton*, 101 U. S. 129, 25 L. Ed. 1046, the word is given meaning by its context. The Congress has "full and complete legislative authority over the people of the territories"; that is, whatever legislative power there is to be exerted by the Congress, to the exclusion of any other body claiming it. But, as is usual, it gives no definition of the nature or limits of the authority which is to be fully exercised. In *Bacardi Corporation* v. *Domenech*, 311 U. S. 150, 61 S. Ct. 219, a statute of Puerto Rico regulating the use of trade-marks was struck down as contrary to a treaty of the United States. The power of the federal government was held to be plenary in the sense that the treaty power takes precedence over the power of a territorial legislature. In *Cases* v. *The U. S.*, 131 F. (2d) 916, it is ruled that the Congress has full power to make all needful rules and regulations in respect to Puerto Rico. And in *Sancho* v. *Bacardi Corp. of America*, 109 F. (2d) 57, and *Buscaglia* v. *Ballester*, 162 F. (2d) 805, it is held that the power of the Congress over the territories stands on its own feet and that its plenitude derives—and needs to derive—no support from the commerce clause.

Behind the argument which enlarges the power of the Congress at the expense of the people of Puerto Rico, by the device of calling the island an unincorporated territory, lurks an inarticulate major premise. Clarity demands that this assumption be made explicit. It is that we are again drifting into an age of competitive nationalism, that security for the United States has come to be among the most imperative of values, that our off-shore territories must be appraised from the standpoint of military potential; and that the power of the Congress must be adequate to deal with any emergent world-disturbance. For that reason there should be authority to seize and govern territory and even to exploit the people of ceded or conquered lands for the benefits of the people of the continental United States.

To this deeply felt — but usually unexpressed — argument the answer is clear. It is here enough to say that the values it seeks to secure are not served by the accused section of the Act and would in no wise be impaired by a declaration of its invalidity. The Congress might possibly decree that sugar is an essential commodity; that, in anticipation of war, the continent should guard against being cut off from off-shore sources; and that security demands the location of the industry on the mainland. But the Congress has done nothing of the kind. Nor is the Congress likely to do so unwise a thing; for the blow to the economics of off-shore political units—and the resulting impairment of loyalty to the United States which would be of inestimable consequence—would be a terrific price to pay for a guarantee against a very dubious contingency. But the point is that the Congress has decreed admission to the continental market of 910,000 tons of sugar from Puerto Rico. The accused section is concerned wholly with the form in which this sugar may come in, a matter alien alike to military potential and national security.

Nor, on a less vital plane, does the invocation of the words "incorporated" and "unincorporated" touch the issue. Our several territories differ in the patterns of their rela-

tions within and to our federal union. The status of each is to be found in a series of acts; and into the detail of the exact position of each within, and its precise relation to, the federal system known as the United States of America, it is as needless as it would be tedious to go. Hawaii, for example, came into the Union by an Act of Annexation which provided that it was to become an integral part of the United States. See *Hawaii* v. *Mankichi*, 190 U. S. 197, 23 S. Ct. 787; the Internal Revenue Act of 1918, Section 1; Internal Revenue Code, Sections 1532(f), 3526(e), 3797(a)(9). Puerto Rico became American territory by the Treaty of Paris which, with reservations and qualifications—as explained in Section A above—left its future status to be spelled out in detail by the Congress. Hawaii was incorporated into "the land" by a single formal act; Puerto Rico has been gradually led towards a more perfect union by a long series of acts. Surely the law does not draw a distinction as to whether a status was achieved by a single jump or a series of steps. The term "unincorporated" has been lifted from the part of the holding in *Downes* v. *Bidwell*, *supra*, concerned with the validity of the tax on import adopted by the Congress as a temporary expedient. At the time, the civil government had not yet been organized and the citizens of the island had not yet been formally endowed with the liberties and privileges of the citizens of the states. To make the word "unincorporated" serve the accused section, it is necessary to isolate it from its frame of reference and convert it into a legal proposition of universal validity. In reading *Downes* v. *Bidwell*, it is well to heed the oft-quoted caveat of Mr. Chief Justice Marshall, "It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheaton 264, 399, 5 L. Ed. 257.[97]

As a general term it is difficult to endow the terms "in-

[97] See also *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, 627, 55 S. Ct. 869 873, and cases cited there.

corporated" and "unincorporated" with any directive or compelling authority. Ever since the Treaty of Paris, the status of Puerto Rico within the federal system has been changing and the series of issues concerning Puerto Rico with which this court had been confronted have had to be answered, not in terms of a general definition of its political status, but of the status which at the various times of decision the island occupied in the federal system. As it has been put by this Court in an opinion concurred in by all its members, " . . . it is evident that whether Puerto Rico comes within a given congressional act applicable in terms of a 'territory' depends upon the character and aim of the act. . . ." *People of Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 257-8, 58 S. Ct. 167, 169.

As respects customs duties, Puerto Rico—held to be unincorporated at the time of the insular cases—is now fully incorporated into the union. Between the island and "the states" there are no tariff barriers.[98] As respects aspects of "internal revenue", it is not as yet fully incorporated. Our system of income taxes has not been extended to the island, not, it is to be noted, as the withholding of a benefit, but because it is a burden which the low level of income will not permit the people of Puerto Rico to bear. The insular has, in fact as well as at law, been fully incorporated into the national economy. Although the Congress is the supreme legislature for Puerto Rico, it has by this court been held to have the power of a state to hold its industries to the competitive pattern through its own antitrust law. *Puerto Rico* v. *Shell Company, (P.R.), Ltd.*, 302 U. S. 253, 58 S. Ct. 167. In respect to commerce by water with the mainland Puerto Rico has been fully incorporated; as a beneficiary of our system of national defense, the island is incorporated territory.

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[98] If the accused section is held valid, a qualification is to be set down. In that event, there are no barriers to the admission of goods from the several states into Puerto Rico. Yet the Congress will have been vested with the power to deny admission of goods from Puerto Rico into the continental United States. The resulting lack of mutuality in the customs union is evident.

If the Organic Act contains a separate Bill of Rights for the People of Puerto Rico, the intent is to accommodate our liberties to a territory habituated to the civil law. The issue in the insular cases, as Mr. Chief Justice Taft has put it, is not "whether the Constitution extended to Porto Rico when we went there, but which ones of its provisions were applicable." *Balzac* v. *People of Porto Rico*, 258 U. S. 298, 313, 42 S. Ct. 343, 348. The plain reason is that "the Constitution . . . contains grants of power and limitations which in the nature of things are not always and everywhere applicable." And, in instances where Constitutional provisions are held not to reach Puerto Rico, it is not that they are withheld, but rather that they are not to be forced upon a people with an alien tradition. Thus, in respect to trial by jury, Puerto Rico has not fully incorporated "local practice" and "procedure does not permit its use in civil cases".[99] It is not, however, that a fundamental right has been withheld; it is rather that the government of the United States has been "sedulous to avoid forcing a jury system upon a Spanish and civil law country until it desired it." *Balzac* v. *Porto Rico, ibid.*, 348. In terms of immunity to suit without its own consent, the Government of Puerto Rico has the status of a state in the Union. *People of Porto Rico* v. *Manuel Rosaly of Castillo*, 227 U. S. 270, 33 S. Ct. 352.

In general the provisions of the Constitution—not at the will of the Congress but where applicable—extend to Puerto Rico. "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted." *Balzac* v. *Porto Rico, supra*, 348. And "the guarantee of certain fundamental personal rights, as for instance, that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in Porto Rico". *Ibid.* 348. If the terms "incorporated" and "unincorporated" signify only within a frame of refer-

[99] *Iriarte* v. *U. S.*, 157 F. (2d) 105.

ence, Puerto Rico has been fully incorporated in respect to the only questions which are relevant here. For, in terms of the liberties of the people, including the ancient liberty of a trade, its citizens have the rights of citizens of a state. And, if a territorial question is here to be raised—which we do not admit—the territory of Puerto Rico has been fully admitted to the customs union—that is to the national economy—of the United States. In a word it is fully incorporated in respect to any issue which may be raised here.

But how plenary or incomplete is the inclusion of Puerto Rico in the Federal Union is beside the point. For Section 207(b), as it affects citizens of Puerto Rico and Section 207(a) as it affects citizens of Hawaii are save for the number of tons identical. They give expression to the same congressional intent; they have the support of the same argument. Alike they abridge the liberties of people living off-shore to confer special privileges upon people living on the mainland. They are alike attempts to put the same mercantilist principle into practice. Yet, whatever may be the deficits in respect to the status of Puerto Rico, Hawaii has been completely made a part of the Federal Union.[100] It is unthinkable that enough magic lies in the words "incorporated" and "unincorporated" to find valid a discriminating provision as it affects the people of Puerto Rico, and to find invalid exactly the same provision as it affects the people of Hawaii. The rights of men, as Mr. Justice Reed put it in *Smith* v. *Allwright*, 321 U. S. 649, 664, 64 S. Ct. 757, are not to be made to turn upon whether the denial is overt or indirect.

An attempt to liken Puerto Rico to the Philippine Islands and thus to throw up a barrier in defense of the accused section has a double weakness. The cases do not say what it is needful that they should say to serve such a purpose; and

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[100] A larger measure of self-government has been accorded to Puerto Rico than to Hawaii. It has the greater power in respect to the insular system of internal revenue. Puerto Rico, unlike Hawaii, has by a recent Act of Congress—(Pub. Law 362, 80th Cong., 1st Sess., 1947)—been authorized to elect its own governor and other officials.

the status of Puerto Rico is not and never has been that of the Philippine Islands. Before its cession to the United States, Puerto Rico was an organic part of Spain; its citizens were citizens of Spain; it was represented both in the Senate and in the Cortes of the Peninsular Government. The Philippines were never an organic part of Spain; its people were never in fact citizens of Spain; it was never represented in the Spanish Parliament. As is pointed out by Mr. Chief Justice Stone for the Court in *Hooven and Allison* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870, and by Mr. Justice Murphy, concurring in part, *Ibid.* 691, every step taken by us in the formulation and execution of our public policy towards the Philippine Islands has aimed at eventual independence. As the account above has shown in detail, every step in the formulation and execution of our public policy towards Puerto Rico—the enactment of the accused section aside—has been shaped towards a more perfect union.

In the leading case of *Cincinnati Soap Co.* v. *U. S.*, 301 U. S. 308, 57 S. Ct. 764, the concern is with a farm relief measure for the producers of "copra, coconut oil or allied products". In the act, as in our first Agricultural Adjustment Act, a tax for convenience is assessed upon the processor, and the collections are to be covered into the treasury of the Philippine Islands. They are presumably to be paid out in benefits to the purchasers who subject their operations to the prescribed scheme of control. The act has little in common with the accused section; it seems quite untainted with discrimination between American citizens; it is in no sense a scheme for the regulation of the continental market. The people of the Philippines are the beneficiaries, not the victims of its provisions. The Act was found valid by a unanimous bench. In its opinion the Court refers to the Philippine Islands not as a territory, but as a dependency, *Ibid.* 314. It is recited, as so often it has been recited, that over the dependency the Congress has supreme legislative power and that "the national government may do for one of its dependencies whatever a

state might do for itself or one of its political subdivisions." *Ibid.* 317. But the opinion makes it clear that the Act in question "concerns itself only with the taxing power of the Federal Government," *Ibid.* 323; and the court insists that "the power of legislation" is limited only by the terms of the treaty of cession and those principles of the Constitution which by their nature are inherently invocable. *Ibid.* 313.

The case of *Hooven and Allison* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870, is still less in point. The court held that fibres in bales, whose point of origin was the Philippine Islands and which were being held in storage awaiting reprocessing were "imports" and therefore immune from the power of the state of Ohio to tax. In his opinion for the court, Mr. Chief Justice Stone was explicit that the holding was limited to the Philippine Islands. Mr. Justice Reed, *Ibid.* 679, dissenting in part, was afraid that the language applied was so broad as to be applicable to Puerto Rico. He protests against the departure from the rule of equality and against legislative discrimination in favor of Philippine as against domestic origin. Mr. Justice Black, *Ibid.* 686, in a dissent joined in by Douglas, Murphy and Rutledge, J.J., protests against the special privilege conferred by the use of the word imports in respect to merchandise from a country not yet foreign. And Mr. Justice Murphy, concurring in part, admits the departure from equality, but is tolerant of it because of the heavy responsibility—augmented by the war—which is ours in respect to the people of the Philippine Islands. In the *Hooven and Allison* case it seems impossible to find, even by inference, an authoritative support for the accused section.[101] And, inasmuch as Puerto Rico has long enjoyed an established government, no distinction between an organized and an

[101] It hardly seems necessary to consider the even more extreme case of Guam; for Puerto Rico is not Guam. A prohibition against the Congress playing favorites among citizens of the United States because of location, when the ends neither of public policy nor of national security, are sought, interferes in no way with our government's seeking, acquiring, and governing outlying military bases.

unorganized territory, can be conjured up to provide a sanction for section 207(b).

Thus the legislative, like all powers exercised by a responsible government, derives from the people and has its limits in the grant. As stated in *Puerto Rico* v. *The Shell Co.*, 302 U. S. 253, 58 S. Ct. 167, the theory upon which these territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with . . . certain fundamental principles established by Congress". Or, as stated in *Cases* v. *U. S.*, 131 F.(2d) 916, "Congress has full power to make all needful rules and regulations" subject only to such "constitutional restrictions upon the powers of that body as are applicable to the situation."

It is unnecessary to multiply these citations. The accused section is not "needful", it serves in no way to promote the welfare of the people of Puerto Rico. It does not move on the plane of rule and regulation, but on the very different level of legislative pleasure. Its concern is not "the territory and property" of the United States. Its operation is entrusted to the Secretary; in its administration the Government of Puerto Rico has no hand whatsoever. In fact, it in no sense takes effect upon "territory" belonging to the United States, but rather upon the people of Puerto Rico who are citizens of the United States. With the cession of Puerto Rico to the United States, the ancient liberties, reserved to the people against the Spanish Crown, were converted into the fuller and broader rights and liberties secured by our Constitution. Through the Foraker Act and the Organic Act as amended the people of Puerto Rico have come into the possession of all the rights, privileges and liberties of citizens of the United States living on the continent. The Constitution endows the Congress with no authority under the territorial clause or otherwise, even by the magic of such a word as "unincorporated", to make distinctions between classes of American citizens, because of residence on island or mainland. The

authority of the Congress over Puerto Rico and its people is limited, constitutional, responsible; and the power to impose the discrimination here complained of lies beyond the utmost reach of its lawful authority.

D. The Congress Is Endowed With No Power to Impose Upon the People of Puerto Rico, in Whole or in Part, a Colonial System, or to Reduce That Territory to the Status of a Plantation.

Thus the true character of the accused section stands revealed. It is no true part of the Act; it is an alien restriction grafted upon the statute. It is a fragment from the Old Colonial System, lifted out of its mercantile setting in the eighteenth and set down in the system of free enterprise in the twentieth century. A dominant instrument of that "commercial system" was the requirement that raw materials were to be sent from the plantations in which they were grown to the home country to be processed. Great Britain in particular was insistent that the islands of the West Indies upon which the cane was grown should not be permitted to process it and that the raw sugar should be transported to England to be refined.[102] Time has turned backward; the Congress has attempted to write a dominant provision of an exploitive system into the law of the land.

1. *The Attempt of the Thirteen Colonies to Escape the Restrictions of the Old Colonial System Created the Climate of Opinion Within Which the Constitution Was Framed.*

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[102] "The progress of the sugar colonies of France has been at least equal, perhaps superior, to that of the greater part of those of England; and yet the sugar colonies of England enjoy a free government nearly of the same kind with that which takes place in her colonies of North America. But the sugar colonies of France are not discouraged, like those of England, from refining their own sugar; and, what is of still greater importance, the genius of their government naturally introduces a better management of their negro slaves." Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations. The Modern Library (that is the Cannan) edition, p. 553. It is of note that the treatise was published in 1776 and that the reference is to the Sugar Act of 1764.

The American Revolution was in large measure prompted by a protest against the Old Colonial System. Although in that glorious creation many groups played important roles, the dynamics came from the colonial merchants, whose opportunities for trade were blocked by the rigidities of the imperial economy.[103]

The Old Colonial System, which stirred our forefathers to rebel against Crown and to desert Realm, was a creation of the seventeenth and eighteenth centuries. It was a product of rising competitive nationalism—of Holland against England against Spain against France. In character opportunistic and practical, it found expression in a host of acts, statutes, ordinances and decrees, emanating from the King in Council, the Houses of Parliament, offices of national and local government. In time and in spite of much variation in detail, its host of expediencies were beaten into a somewhat articulate whole. It was erected through an alliance of the "political" with the "commercial" interest. The state found an ally in the commercial group, which helped to subdue local allegiance and to strengthen the Crown. The merchants needed the State to enlarge the orbit of their "adventuring" and to break open new, and to maintain old, markets. The individual became a citizen in a political, and even a military, economy. The country was to be made rich and in the opulence of His Majesty all loyal subjects were to share.

Strength became the great objective of national policy. The great states which had arisen were ready at all times to combat each other with blockades, tariffs and arms. War was an instrument of national policy and peace was an armed interlude between trade wars. In the minds of ministers of State the regulation of commerce was an exercise of the war power. Commerce and the military were complementary instruments of statecraft ready at all times for use. To a country like England, lacking in minerals, precious metals were of exaggerated value. Piracy was a

[103] Arthur M. Schlesinger, The Colonial Merchants and the Revolution.

bolder and more elementary form of commerce. Money was confused with capital and in general wealth was to be won at the expense of other nations.[104]

Thus the colonial policy—as those who made the American revolution meant it—was the weapon of a militant nationalism. At first the function of the colony was to discover, exploit and send home the precious metals.[105] As this hope vanished, it became the office of "the plantation" to produce staples which, within and at a profit to the mother country, could be processed or refashioned into wares of trade. In time the great objective of colonial policy came to be the creation of a self-sufficient economy as broad as, and coterminous with, the empire which was coming into being. In the fashion of their age, statesmen looked to Nature for the broad outlines of the system. But the art of politics was called upon to modify and reinforce the decrees of climate, resources and Nature's god. The use of such devices as duties, embargoes and navigation acts to barricade commerce against the foreigner is the negative side of the picture. The positive side is a series of measures designed to lock the metropolis and the dominions together in a territorial division of labor. In the processing, fabrication, and finishing of wares, England was to follow its natural bent; and each of the Colonies, in accordance with the decrees of Nature and of Parliament, was to make the most of the advantages given it.[106]

So by virtue of a variety of acts, ordinances and administrative orders, a single world-wide commercial dominion was to be all British. In this great economy, raw materials

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[104] The authoritative work is Eli F. Hacksecher, The Continental System; for an exhibit of contemporary thought see William Temple, Essay on Trade and Commerce and Thomas Mun, England's Treasure by Foreign Trade.

[105] A brief and colorful picture of the Old Colonial System as it was operated by Spain in the New World is to be found in the opening pages of Harlow Person, Mexican Oil.

[106] An uncompromising apologia for the colonial system is Philip Cantillon, The Analysis of Trade Commerce, Coin, Bullion, Banks and Foreign Exchanges (1757). An equally uncompromising attack on the system is Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, particularly Book IV, which is concerned with an analysis of rival commercial systems.

from the various overseas plantations were routed through the port of London where a toll was taken on the passing traffic. The various processes known to an age of handicraft as "manufacture" were in general reserved to the homelands; such trades were not proper to the plantations. The sugar islands of the Barbadoes and St. Kitt ranked far higher in the Colonial system than the colonies on the North American continent; and to them by law and Nature was secured a virtual monopoly of sugar and other of their tropical products. To Virginia and Bermuda was accorded an exclusive right to grow and sell tobacco, to insure which the people of the British Isles were forbidden to cultivate the noxious weed. In like manner exclusive concessions were made to the different colonies in respect to the growing of various staples. A concession, a real breach in the rising British economy, allowed the New England colonies to build ships.

The general economic pattern as it affected His Majesty's North American colonies, followed the prevailing trend. It aimed to secure to England a monopoly of manufacture, to establish in the plantations a market for its goods, and to allow the colonies to send raw materials in return. It denied opportunity to colonists in order that benefits to the people at home might result. In effect it set up a superior citizenship for the United Kingdom and an inferior citizenship for the English folk overseas.[107]

The break with England came largely as a result of the attempt of Crown and Parliament to strengthen the rigidities of the Old Colonial System. That system which was alike a commercial blockade of foreign nations and an articulate economic plan for the empire had always operated with an indulgence in benevolent negligence. Smugglers had been viewed as performing the social office of mitigating the severities of Acts of Parliament in the interests of a freer commerce; and private settlement between the King's Offices and the "gentlemen" of the trade

[107] William Graham Summer, Alexander Hamilton, p. 3.

had come to supersede judicial proceedings as a means of operating the revenue laws. The American colonies had grown and prospered largely because of the laxity with which the mercantile system had been administered.[108]

The attempt, after the accession of George III, to make the colonial system in fact what it was on paper was bound to stir up American resistance. It is needless here to recite the series of measures by which Great Britain attempted to stop the leaks and the indulgences in its political economy. As early as 1764, the Paper Money Act, making only coin of the Realm legal tender, became a menace to the trade of the colonies. In the same year the new Sugar or Molasses Act—to which the accused section bears so strong a resemblance—got in its licks. The old sugar act had never been enforced; the new act, although providing for a reduction of three pence the pound, was meant to be taken as a reality. In 1765 the Stamp Act was aimed not only at the collection of revenue but also at bringing all business documents within the cognizance of the public authorities. In 1767 came the Townshead Act, imposing duties on a long list of manufactured goods and in effect making Great Britain the only source of colonial supply. In 1770 all the duties were removed save the tax on tea, accompanied by a bold assertion of the authority of the Realm. The Navigation Acts, intended to secure to British bottoms a monopoly of the carrying trade, persisted and were tightened throughout this period. The closing of the port of Boston in 1775 is indicative of preventive measures employed to police the Old Colonial System. In addition to Acts of Parliament there were Orders of the King in Council and the rulings of the Board of Trade, in theory interpretative, in reality constituting a network of minor restraints tending to weave more closely the pattern of the mercantilist system. In the '60's, grievances were largely economic; as the decade advanced economics were

[108] Horracks, A Short History of Mercantilism; G. L. Beer, The Origin of the British Colonial System, pp. 467-72, 481-3, and Edgar S. Furness, The Position of Labor in a System of Nationalism.

commuted into political questions; by its end these issues concerned with the nature and operation of the British commercial system had become matters of high principle.

All of this was too much for the people of the colonies,[109] long accustomed to a careless, if not generous, tolerance. They had become too headstrong to accept the new and rigid discipline which Crown, Ministry and Parliament was attempting to impose on them. Other scourges had driven groups into rebellion; the attempt to regiment their trade to the strictures of the Old Colonial System induced "the commercial interest" to join the revolution. And eventually, by "the unanimous declaration of the thirteen United States of America, in Congress." It was resolved no longer to endure "the patient suffering of these Colonies," and to recognize "the necessity which constrains them to alter their former System of Government."[110]

2. *The Constitutional Convention, After Adequate Deliberations, Rejected a Colonial Status for the People of Any Territory Belonging to the United States.*

The separation of the thirteen colonies from Great Britain involved an economic as well as a political revolution. Independence meant that Acts of Parliament and interpretations of the Board of Trade were no longer binding. As a result that mosaic of law by which the colonial system had operated no longer had power to compel action on this side of the ocean. Peace brought the task of filling the void left by the departure of the established economic order. The Continental Congress was not ready for a major venture into the regulation of commerce. The sev-

[109] S. E. Morrison, Documents of the American Revolution; Morrison and Comanger, The Growth of the American Republic; John C. Miller, Origin of the American Revolution.

[110] Thomas Jefferson, Summary View of the Rights of British America, is to be found in any edition of the Works. It appears both in the selected writings (Modern Library edition) and in Saul Padover, editor, The Complete Jefferson. An illuminating gloss is Edmund S. Morgan, Colonial Ideals of Parliamentary Power, 1764-1766, an article in a late issue of the William and Mary Quarterly.

eral states were disposed to take their newfound independence seriously. As sovereigns each was inclined to fit itself out with an economy of its own. As victims they had condemned the specific strictures of the Old Colonial System; yet it was not easy for them to rid their minds of an economy which was mercantile in character. A spirit of competitive localism found expression in the imposition of taxes and the regulation of trade. Boundaries between states became political frontiers. Angry quarrels sprang up between New York and Connecticut and New Jersey. State tariffs provided retaliatory measures. In course of time New Hampshire, Massachusetts, Pennsylvania, Virginia, Georgia and the Carolinas were all involved in trade disputes. State accused state of levying tribute upon its neighbors by imposing duties upon its own distinctive products. The complaint was general that the maritime states were regulating their ports to the detriment of the interior. The nationalism of the Old Colonial System reappeared in thirteen miniature copies.

A move toward a more perfect union was inevitable. Complaint was general, especially on the part of the commercial interest; and "committees of correspondence" helped to weld local groups into a national bloc. As 1785 came to an end, Virginia proposed that commissioners from the various states meet to examine "the trade of the United States . . . and the said states" and to discuss "how far a uniform system in their regulation may be necessary to their common interest and permanent harmony."[11] But by the time the commissioners met in Annapolis in September, 1786, a host of substantial citizens had come to the conclusion that it would be futile to vest control of commerce in the Congress of the Confederation and that such a power was to be entrusted only to a government "so branched, changed or altered" as to be able to wield it. For due to Shay's rebellion, and the state of the nation of

[11] Jonathan Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, etc., I, p. 115.

which it was the obvious symptom, the prestige of the Congress had reached a new low. The delegates to Annapolis were by their instructions confined to a consideration of commerce. Since it appeared that "the power of regulating trade" was "of such comprehensive extent" as to involve "the general system of the Federal Government," an effective attack was bound to require "a corresponding adjustment of other parts of the federal system."[112] To meet this larger problem of repairing the breach in the economy occasioned by the separation from Great Britain, the Annapolis delegates proposed a convention with representatives from all the states "to meet at Philadelphia on the second Monday in May," 1787. It was hoped by Mr. James Madison that "so select a body would devise an adequate remedy for the existing and prospective evils so impressively demanding it."[113] The very existence of "the American experiment" was at stake.

It is now commonplace that in the Convention of 1787 the several "interests which make up the commonwealth"[114] were to the front. The clash of states and of sections, even in respect to political questions, were largely economic in character. It is of significance that the debate on political issues, such as representation in Senate and House, broke early in the session, was attended by some heat, and touched off economic issues. The economic issues were then taken up, and after adequate deliberation disposed of. When attention was again turned to political questions they were rather quickly settled. Mr. Madison, conscious that "all civiled societies" are "divided into different Sects, Factions and Interests," as they happen "to consist of rich and poor, debtors and creditors, the landed, the manufac-

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[112] Elliot, I, p. 118.

[113] From a rough draft to a preface to Madison's Notes on the Convention, Max Farrand, The Records of the Federal Convention of 1787, III, 539-551.

[114] In his Journal, Mr. Madison makes much of the pitting of interest against interest. Mr. Charles Pinckney, of South Carolina, resolved "the people of the United States" into the "three classes" of "professional men", "commercial men" and "the landed interest". Note that laborers and those engaged in subsistence agriculture are omitted.

turing" and "the commercial interest"[115] was intent upon such political arrangements and such distribution of power as would not disturb the unity and harmony of the body politic. In this attempt to create a balanced system and to prevent any interest from overriding another interest in the new republic, the Convention moved forward. In a number of ways the colonial question provoked vigorous debate.[116]

It was involved in the over-all commercial arrangement decreed by the Convention. As the urge which prompted the gathering was to escape the crisis whose roots were economic, so the drive was to set in reverse the movement towards industrial fragmentation. A single "customs union"—we today would say national economy—was to be created and this national economy, not limited to the states, was to be as comprehensive as the land. There is hardly a provision of the Constitution which is not touched by this insistent drive. In shaping the structure of government a careful balance was devised between sections of the country with their distinct economic interests. It was impossible, in view of difference in area, wealth and population, to make citizenship mean the same thing in all the states. But, where political rights were somewhat unlike, the sting of unequality was taken away in the economic realm. For, thanks to the Fathers, the people were free to move across state lines in search of the main chance, and goods were free to cross political boundaries in search of wider markets. Even the "judicial power of the United States" was made responsive to this nationalistic urge. A primary reason for the creation of the Supreme Court was to settle controversies between the several states arising out of commerce; the function of disposing of boundary controversies came up late in the session.[117] In general, however, the establishment of a framework within which a national

[115] The Journal for June 9th.

[116] These debates are fully presented in Max Farrand, The Records of the Federal Convention of 1787.

[117] Madison's Journal.

economy might come into being was focused upon three questions, each of which found its answer in an appropriate clause. And, in respect to each of these, the colonial question was clearly in mind.[118]

The Commerce Clause—The first of these questions was the control of "commerce", a word which in late eighteenth century usage stood for the market, in distinction to the domestic or subsistence economy. The history of the writing of the commerce clause, from its inception in the Randolph resolution, granting to the federal government power in respect to matters which lay beyond "the competence of the several states" to its eventual formulation in the power of the Congress to regulate commerce with "foreign nations, among the several states and with the Indian tribes," has been often written both in histories of the Convention and in the opinions of this Court, and need not be repeated. For present purposes, it is enough that the debates were concerned largely with form and detail. The drive was to level domestic tariff walls, to prevent trade wars along boundary lines, to stop for all time the cutting of the economy to the political pattern set by the several states.[119]

The Taxing of Exports—The second is the question of the grant or denial of the power to tax exports. Although it provoked a major battle, it has had far less attention from the historians and the courts. The tax on exports had been a dominant weapon of the old commercial system; it was a well-practiced way of collecting revenue at the expense of the foreigner. When the matter first came up it appears that there had already been a great deal of discussion and an informal agreement had been reached that there was to be no tax on exports. When next the question was raised, Mr. Gouvernour Morris, standing on current

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[118] The traditional approach to the Convention of 1787 has been so dominantly political that the superb craftsmanship of the Fathers in the economic realm has been largely overlooked.

[119] The practice is in vogue today. Thus Bolivia by an export tax imposed upon tin collects a substantial share of the expense of operating its government from consumers in the United States. British and Dutch Malaya, through natural rubber, exercise a like power of taxing persons outside of their dominions.

realities, stated that "all countries having peculiar articles tax the exportation of them"[129] and insisted that "the state of the country, also, will change and render duties on exports" such as "skins, beavers, and other peculiar raw materials politic in the view of encouraging manufacture." This last note provided a theme to the members from the rising manufacturing interest. Resting upon orthodox mercantile theory, it put the United States, particularly the New England States, in the role of Great Britain. If the new republic was to be fitted out with its own nationalistic economy, not only must manufacture be encouraged, but a division of labor must be effected within the federal union between the production of raw materials and the fabrication of finished wares. To that end the old device of a tax on exports—perhaps their prohibition in particular instances—was in order. For if raw materials were allowed to be exported, it would be at the expense of the processing industries of the nation, and as a result they might be unable to carry on for lack of supply. In the spirit of competitive nationalism it was argued that an export tax "on lumber and on livestock" could be made to fall heavily upon the West Indies; and, "in case of a dearth . . . we may extort what we please." On a higher level, Mr. James Wilson insisted that "to deny the power is to take from the common government half the regulation of trade." Mr. Madison thought that, "even though it may not be expedient at present," a tax on exports "may be so hereafter." Mr. Fitzsimmons, looking to the time when the United States should become a manufacturing country, did not want "to foreclose a future necessity." The opposition to the grant of the power to tax exports came largely from the Southern states. They wanted to be secure in overseas outlets for their staple crops and were unwilling to entrust to the general government any power to drive a barrier between exports and their European markets. They were for the time at least quite satisfied with the position which they

[129] Madison, Journal for August 28, September 15.

had occupied before the separation from England. They were fully content to send their staples abroad, knowing that they were to be paid for in tropical products and manufactured goods. Thus, after prolonged debate, "security" for the staples was voted by Massachusetts and all the states south of Maryland. And thus from mixed motives of interest and of theory a dominant aggressive weapon of the Old Colonial System was given up.[121]

State Taxation of Imports—Again, in fixing the place of the states in the federal union, the colonial question was raised. It came to life in the discussion of the proposal forbidding any state to "lay duties on imports or exports." As a merchant and a Virginian, Mr. George Mason was unwilling to have his state surrender its power to shape its commercial destiny; for "particular states might wish to encourage by import duties certain manufactures, for which they enjoyed material advantages." Mr. Madison could not agree; for the encouragement of manufacture by separate state action required duties not only on imports from abroad, but also from other states of the Union; and the result would be the perpetuation "of all the mischiefs experienced from the want of a general government over commerce." To this end Mr. Clymer was of opinion that some such prohibition was necessary "to prevent the Atlantic States from endeavoring to tax the Western States." He was certain that "the encouragement of the Western Country was suicide on the old states." He added that "if states with different interests cannot be left to regulate their own manufacture without encouraging the interests of other states, it is a proof that they are not fit to compose one nation." And Mr. King objected that to strip the states of power over imports and exports "would too much interfere with the policy of states respecting their manufactures." But his views did not prevail; the current reality of tariff walls maintained by the several states was

[121] Madison, Journal for August 16, 21. The clause as eventually it came to rest in the Constitution reads, "No Tax or Duty shall be laid on Articles exported from any state" (Article I, Section 9).

too obvious for that. So, with Massachusetts and Maryland alone in dissent, the delegates proceeded to adopt the provision.[122] In this they were with Mr. Madison who was "more and more convinced that the regulation of commerce was indivisible and ought to be under one authority."[123]

Nor did the matter stop there. What the states could not do directly, they were not to be allowed to do by indirection. They were not to be permitted to employ inspection laws and kindred devices to impose state tariffs. A motion by Mr. Roger Sherman, a flurry of debate on the floor, a formulation by the Committee on Stile, a further indulgence in debate, and it was agreed that "no state should, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." The Constitution, Art. I, Sec. 10. From the temptation to levy revenue—and in its name to accomplish other objectives—through the imposition of customs duties, the States were forever delivered.

The Colonial Question—By such provisions dominant instruments of the Old Colonial System were rejected. The Congress was denied the power to employ an export tax and thus to exploit other peoples in the sale of commodities peculiar to us. As a government of delegated power, the Congress was granted no authority to impose import or export duties upon any state to the advantage of its people or to the detriment of the people of other states. A like prohibition against import and export taxes was imposed upon the states and guarded against evasion. It is through

[122] The members of the Convention clearly realized—as the debates disclose—that the prohibition of an export tax meant purchases of manufactured goods from abroad rather than from the Atlantic States and that it was a serious hazard to the erection of a new England as the metropolis in any American colonial system.

[123] Madison, Journal for August 28, September 15.

these clauses that all the territory belonging to the United States became fused into a single national economy. In this economy there was to be equality of opportunity; the legislative fiat, whether federal or state, was not to be used to secure industries to one state at the expense of others. The Atlantic States were not to be allowed to become a new England, which was to enjoy an exclusive right to manufacture at the expense of the states to be carved out of the great Western country which as a result would be limited to the production of raw materials. A state, a group of states, a section was not to be granted privileges withheld from others of its kind. It is significant that the territories were brought into the debate, and that all measures were turned down which imposed, or threatened to impose, a colonial status upon them. The Constitution completed the work of the Revolution. A generation which fought to escape the Old Colonial System was unwilling to impose its severities upon their fellow countrymen who might venture forth to do business in a territory.

This short account shows how incongruous is the position of the accused section in the scheme of trade relations between the island and the states. Although it runs counter to the treaty of cession and invades the civil liberties of American citizens living there, it would logically have been possible never to have brought Puerto Rico into our customs union, or national economy. In that event, the Congress would have been able to levy tariffs upon—or even to exclude from the continental market—Puerto Rican products. But, in that event Puerto Rico would be equally at liberty to impose duties or even embargoes upon goods arriving from the mainland. The powers of the Congress and of the insular legislature would be identical, as they were between Spain and Puerto Rico under the instrument of 1897. But the Congress has not accorded to the island—and the insular government has not asked for—any power to regulate goods coming in from the several states. The Congress asserts the power of laying an embargo against admittance

to mainland markets of Puerto Rican products. Yet it extends to the island territory no reciprocal rights. It claims the authority, by admitting or excluding its products, to regiment the economy of Puerto Rico to the benefit of the mainland, or even of a special interest within it. The one-way assertion of power to shape insular destiny goes back of the arrangements decreed by Spain for Puerto Rico. It marks a reversion to the Old Colonial System.

The facts of the American Revolution and the proceedings of the Constitutional Convention are not mysteries which have been veiled from the courts. In cases before them, particularly cases concerned with the rights of citizens of the United States living in the territories, these matters have been repeatedly recalled. In *Scott v. Sanford, supra,* Mr. Chief Justice Taney states categorically that "there is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies, burdening on the United States or at a distance, to be ruled and governed at its own pleasure" (*ibid.* p. 718). He goes on to say that a new territory "is acquired to become a state, and not to be held as a colony and governed by Congress with absolute authority." And to relate the Constitution to the struggle out of which it had grown, rhetorically he asks (*ibid.* 744), "Could it have been the purpose of Washington and his illustrious associates . . . to reestablish in the Constitution of their country that fort which had been prostrated amid the toils and with the sufferings of seven years of war?" In *Downes v. Bidwell, supra,* Mr. Justice Harlan, in a part of his dissent concerned with an issue on which the Court did not divide, insists that "the idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genus, as well as with the words, of the Constitution."

E. The Accused Section of the Act Runs Directly Contrary to the Intent of the Constitution, to Our Obligations Assumed by Treaty, and to the Spirit of the Law of the Land.

We have always understood that the Constitution was an instrument to serve the general welfare, not a strait-jacket within which the federal political order and the national economy were to be confined. The members of the Convention of 1787, in the words of Mr. Justice Moody, dissenting, in *Howard* v. *Illinois Central Railroad Co.*, 207 U. S. 463, 28 S. Ct. 141, 148,[124] "were not content to frame a system of laws sufficient for the present moment which might, in a few years, become unsuited to, or inadequate for, the needs of the people." Accordingly, they chiseled constitutional power into propositions flexible enough to be adapted to the variety in circumstance which time and change were certain to bring. Their work left little room for an antithesis between national necessity and constitutional command.

If, however, the specific principles of the Constitution are so rigidly read as to be compelling the intangible values are not to be overlooked. The intent of that instrument, the obligations we have assumed by treaty, and the spirit which from days of old had attended the weaving of the law of the land are not to be neglected. Where it is adjudged that the Constitution allows discretion, they present sanctions to guide the exercise of that discretion. Where, as here, the Constitution furnishes no warrant for the enactment of the accused section, they offer substantial reasons against endowing the Congress with such a power. No elaborate argument is here to be presented in support of the propositions below; but, in the manner of the several opinions in *Hooven and Allison Co.* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870,

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[124] These cases are commonly referred to as the "Employers' Liability Cases." This part of the Opinion is not concerned with the question on which the Court divided.

the propositions below—without detailed exposition—are put forward as auxiliary reason for the invalidity of Section 207(b).

1. *The Accused Section of the Act Encounters Perils From Many Specific Clauses in the Constitution.*

It has been shown that the accused section rests squarely upon no power delegated to the Congress. It has likewise been pointed out that, in its departure from the rule of equality, it violates the requirement of due process and invades rights reserved to the people. In addition, it encounters perils—and provides open questions—in respect to other clauses of the Constitution.

In fact it skirts the very limits of constitutional authority. At the threshold it meets a challenge in the Preamble of the Constitution. It imposes an economic handicap upon the people of Puerto Rico, not laid upon the people of the mainland; it thus tends to prevent, rather than to form, a more perfect union. It takes from one, and confers upon another, group of American citizens economic opportunity; it can therefore scarcely be held to establish justice. Among the citizens living in Puerto Rico it stirs up grievances against the United States in Congress assembled; thus it can scarcely be said to promote domestic tranquility. By abridging the rights of the people of Puerto Rico, it fails to secure the blessings of liberty to an insular group among ourselves and our posterity. In this and other ways, it can best be described as setting the Preamble to the Constitution in reverse.[128]

In terms of the text itself, it runs directly contrary to the intent of many specific constitutional provisions. It is written (Article I, Section 8) that "the Congress shall have Power . . . to establish an uniform Rule of Naturalization." By naturalization the citizens of Puerto Rico become citizens of the United States. It is by the rule of naturaliza-

[128] The Government of Puerto Rico is disposed to argue that "the good neighbor policy" should begin with our own insular possessions.

tion that persons born in a foreign country come into the same status as persons native to the several states. The accused section violates the uniformity of the rule by admitting natives of Puerto Rico into a limited citizenship. It is written (Article I, Section 8) that "the Congress shall have Power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." The Fathers were thoroughly familiar with the evils which had attended the royal grant of monopoly. In setting up a government of limited powers, they were careful not to bestow upon the Congress power to issue grants of monopoly. Its context makes it evident that this power to grant, for limited times, exclusive rights to authors and inventors was written as a special exception in the absence of power to grant monopolies. The accused section—save for the 126,033 tons allowed—confers a grant of monopoly upon the coast sugar refiners, which operate in a lockstep so close as in effect to constitute a monopoly. See *Sugar Institute* v. *U. S.*, 297 U. S. 553, 56 S. Ct. 629.

It is written (Article I, Section 9) that "no preference shall be given by any Regulation of Commerce or Revenue to the Ports of one state over those of another." The word "state" may or may not be used to comprehend a territory; the case law does not settle this question. But that the challenged provision operates in such a way as to prefer continental to insular ports in the shipment of refined sugar admits of no doubt. It is written (Article I, Section 9) that "no Tax or Duty shall be laid on Articles exported from any State." It is here more positive that the word "state" is to be read as comprehending a territory. This prohibition to the Congress of levying an export tax helps to make way for the creation of a truly national economy. Puerto Rico cannot maintain a self-sufficient economy of its own; its very survival depends upon linkage with the continental economy. The word "export" is to be read in terms of the

function the prohibition is designed to effect; if an export tax is invalid, an embargo, surely an embargo as nearly complete as that imposed upon direct-consumption sugar, is invalid. The three clauses—commerce, federal prohibition of export taxes, state denial of customs duties—are intended to establish a single national economy as broad as "the land". It is obvious that the accused section runs directly contrary to the economic theory which animates the Constitution.

All along the line, the Constitution consistently interposes its challenge to all attempts to set up and operate trade barriers within the domestic economy. It is written (Article VI) that "this Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." It is written (Article IV, Section 1) that "full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other State" and (Article IV, Section 2) that "the citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." Again (Article III), "the judicial Power" is extended "to all cases in Law and Equity, arising under the Constitution, the Laws of the United States and Treaties made . . . under their Authority." The prohibitions against mercantilist restraints are explicit; the security against trade barriers is to operate for all citizens of the United States alike; the judicial power is there to be invoked, in defense of rights secured by the Constitution and against arbitrary interference by the government with freedom of trade. All of these prohibitions are a little later tied together by the injunction (Amendment, Article V) that "no person shall . . . be deprived of life, liberty, or property without due process of law", an injunction which in enlarged language was somewhat later (Amendment, Article XIV, Section 1) imposed upon the several states. Thus Section 207(b) of the Act, which abridges the liberty of citizens for no other reason than the advantage of other

citizens in the same industry has to run the gauntlet of many specific prohibitions of the Constitution.

2. *The Accused Section Cannot be Reconciled with Obligations which the United States has Assumed by Treaty through the Treaty of Paris.*

So far as we can discover, a conflict between a statute such as the accused section and obligations assumed by treaty to protect a body politic in its civil liberties has never been resolved by this Court. At this place, therefore, no more will be done than briefly to recite the conflicting considerations.

As sounding in contract, the status of a treaty is clear. A treaty involves as parties two countries, and, therefore, is supposed to fix the limits within which a single country is free to legislate. To the same effect is the Federalist, LXIV, which gives to a provision in a treaty preference over an Act of the Congress. The idea that a subsequent Act of the Congress might abrogate a treaty, or a provision thereof, was evidently not contemplated by John Jay, advocating the adoption of the Constitution—and presumably not by the framers of the Constitution.[128]

The case law, however, seems to read to the contrary. From it three propositions are to be drawn; but no one of the three has the support of an exaggerated weight of author-

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[128] "Others, though content that treaties should be made in the mode proposed, are adverse to their being the supreme laws of the land. They insist and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period or under any form of government." The Federalist, No. LXIV.

ity. The first is that the treaty, if later in time, will control. *Whitney* v. *Robertson*, 124 U. S. 190, 8 S. Ct. 456; *Horner* v. *U. S.* 143 U. S. 570, 12 S. Ct. 522. The second is that a later statute will take precedence over an earlier provision in a treaty. In such an instance, the offended country has access to diplomatic process for the redress of its grievances.[127] *Cook* v. *U. S.*, 288 U. S. 102, 53 S. St. 305.[128] The third is that the courts will try to construe treaty and statute in such a way as to save both.[129] The one will not be deemed to repeal the other unless they are in absolute conflict. *U. S.* v. *43 Gallons of Whisky*, 108 U. S. 491, 2 S. Ct. 906, 908.[129] The cases are not sufficient in diversity of situation to free these holdings from the concrete situations before the court and to convert them into general rules of law.

Such holdings seem strangely alien to the instant case. In the Treaty of Paris, Spain relinquished its sovereignty over Cuba, to be exercised by whatever power came into the succession. In quite different wise, it ceded to the United States what—and only what—it possessed. It did not—in fact it could not—cede to the United States any power to deny, abridge, or withhold the ancient liberties of the people. For by the Spanish Constitution of 1876 and the Constitution proclaimed for Puerto Rico in 1897, it was acknowledged that these civil rights belonged—and from days of old had belonged—to the people and lay in a realm untouched by the sovereignty of the state and made secure against its trespass. This acknowledgement of a reserved province took the form of a social compact. The state's authority—its territorial dominion, its public property, such

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127 Here, resort to diplomacy touches off a "diplomatic question" quite analogous to the "political question" of Constitutional law.

128 " . . . . if the two are inconsistent, the one last in date will control the other." *Whitney* v. *Robertson*, 124 U. S. 190, 8 S. Ct. 456, 458. It hardly seems necessary here to set down a complete catalogue of the cases, since those not mentioned break no new ground.

129 "When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; . . . " *Whitney* v. *Robertson*, *supra*. "The terms of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language." *U. S.* v. *45 Gallons of Whisky*, *supra*.

as roads, harbors, buildings—it could and did transfer. The civil rights of the people, like the private property belonging to them, whether realty, chattels or intangibles, the Crown could not—and did not—cede to the United States. In the relations between the United States and Puerto Rico, this elementary fact that the liberties of the people were not ceded has not been forgotten. Precedence has sometimes been given to Spanish over Anglo-American statement of rights; the Spanish liberties to a considerable extent have been commuted into the traditional version of our legal system. But they have not been denied or made subject to the pleasure of the Congress.

The civil rights, however, of the People of Puerto Rico do receive explicit mention in the Treaty of Paris. The civil rights of the several territories ceded are left to be "determined" by the Congress of the United States (Article IX). This article attests both the existence of these rights and their recognition by the two national parties to the agreement. The key word here is, in the infinitive, "to be determined" and it is hard to discover a better term with which to convey the intended meaning. The word "to determine" is in the Spanish text "determinare"—and is of Latin origin. Its etymological meaning is to fix or mark out the limits of that to which it relates. In Spanish it has been held rather strictly to its primitive meaning. In English it has been allowed to stray; yet, in its departures, it has never wandered so far as to mean "created by", "endowed with content through" or "to be held at the pleasure of". For the Congress could fix, or write down in precise terms the limits only of an area which was recognized. Context and history, reinforcing definition, make it clear that as used in Article IX "to determine" means to spell out, to reduce to precise terms, to formulate in detail.

Such a reduction of civil rights to precise terms was necessary; and it could not be effected by the treaty makers. The territories ceded by Spain to the United States were widely scattered; their populations were dissimilar in race,

language, traditions, economies. They occupied distinct places in the Spanish Empire; their people were very differently seized of civil liberties and of political rights under the Peninsular government. A single formulation could not have been made to fit cases as dissimilar as those of the Philippines and Puerto Rico. The civil rights for each of the territories which Spain gave up would have to be determined separately and probably could not be determined all at once. The task, not of creating but of adapting a bill of rights to the culture, desires and necessities of an insular people was not for diplomacy. The treaty could recognize these rights and point the way; their specification had to be left to the Congress. The rationale of elevating a later statute over an earlier treaty does not apply to the instant case. Moreover, Puerto Rico was not a party to the treaty; it is rather, at least in technical terms, to be described as a third party beneficiary. As an injured party it has no access to diplomatic channels. For the redress of its grievances, it has no recourse save to the courts.

But that the power of the Congress over Puerto Rico has been limited by the Treaty of Paris seems to be recognized.[130] To citizens of Puerto Rico, by the terms of the Foraker Act, writs of error and appeals were to be allowed from local courts to the United States Supreme Court "in all cases where the Constitution of the United States or a treaty thereof or an Act of Congress is brought into question" (Act, Section 35). In respect to the Philippines—the argument is even stronger in respect to Puerto Rico—this Court in an unanimous opinion has held that "the power of legislation" is "limited . . . by the terms of the treaty of

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[130] The exchange of views between the United States and Spain, in respect to the civil liberties of the persons in the ceded territories, is covered in: Duque de Almodóvar del Rio, *Documentos presentadoes a las Cortes en la Legislatura de 1898 por el Ministro de Estado (Tratado de Paz con Estados Unidos—Negociaciones diplomaticas deade el principio de la guerra hasta la firma del protocolo en Washington)*, Imprensa Rivadeneyra, Madrid 1899; and the collection by Clarence Edwin Carter: *Territorial Papers of the United States*, Government Printing Office.

cession." *Cincinnati Soap Co. v. U. S.*, 301 U. S. 308, 313-314, 57 S. Ct. 764, 767.[131]

If the two stood alone, the relation of the accused section to the Treaty of Paris would present an open question. But it happens that the civil rights here invaded have a more fundamental basis than the Treaty of Paris or even the Organic Act as amended. Therefore these considerations respecting treaties are presented, not as independent, but as auxiliary arguments for the lack of authority in the Congress to enact the accused section.[132]

3. *No Power to Strip One Group of United States Citizens of the Right to Compete and to Vest the Business in Another Group of Citizens in the Same Industry Has Been Delegated to the Congress by the Constitution.*

It is an axiom, under our system of government, that absolute, unqualified, irresponsible power belongs to none of its departments. As with the executive and the judiciary, the power of the Congress is limited. Nowhere in the enumeration of its powers is authority granted to the Congress to prefer one group in an industry over another, to restrain the trade of certain citizens to the advantage of other citizens or to vest a preferred interest with property rights in the market. Nor is such a power to be spelled out by recourse to other powers. To make either the commerce or the territory clause provide a sanction for the accused section, it is necessary to argue that such grants are absolute. In respect to the territories this contention has been answered above (Section C). An argument for the absolute character of the commerce power is too contrary to judicial usage seriously to be put forward.

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131 It is also to be noted that at the time of the Treaty of Paris, the Crown of Spain did not possess—and, therefore, could not cede to the United States—the power to regulate trade between the island and the sovereign country. By the Puerto Rican Constitution of 1897 the regulation of commerce between Island and Peninsula was a matter for joint action.

132 The accused section runs directly contrary alike to the oft-professed obligations of the United States and to the general principles in respect to backward or depressed areas as put forward in the Atlantic Charter.

Escape, then, is to be had only by contending that, whereas in regulating commerce among the several states, the Congress must legislate within the framework of a responsible government, in regulating commerce between the continent, and an organized territory, it can act in a dictatorial manner. As sheer logic it is impossible to see how a single provision can give expression to a constitutionally limited power of the Congress as it affects commerce among the several states and an unconfined power as it affects the commerce between the island and the states. The power in question is not in words conveyed; to discover the implication involves verbal jugglery and logical lapse.

If, however, such a power has not been delegated, clearly it has been withheld; and, if withheld, all bothers about whether it is limited, and what its limitations are, end. For it is written (Amendment, Article X) that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." A number of "the powers" so reserved to the people are specified in the instrument itself. But the rights of the people do not have to be reserved in concrete language; upon that matter the silence of the Constitution speaks plainly. For it is written (Amendment, Article IX) that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others reserved by the people." In support of this contention, it hardly seems necessary comprehensively to explore case law. Here it is enough to set down a few representative holdings from the reports.

It was in construing and applying the territory clause that in *Scott* v. *Sanford*, 19 Howard, 393, 633, Mr. Chief Justice Taney based his whole argument on the proposition that "this government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution or necessarily to be implied from the language of the instrument." The power of the Congress to vest a favored group with market rights is not

to be found in the Constitution and certainly it is not "necessarily" to be implied from its language. He continues (*ibid.* 719) "the power of Congress over the person and property of a citizen can never be a mere discretionary power under our Constitution and form of government." The Congress "cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it." He continues, "an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory . . . could hardly be dignified with the name of due process of law." The only justification presented for Section 207(b) is that the Congress can discriminate because the favored group carries on in the States while the unprivileged group operates in a territory. The language quoted has exactly this situation in mind. The powers of the Congress "over person and property", necessary to sustain the accused provision is, in the words of Mr. Chief Justice Taney, "not only not granted to Congress but are in express terms denied."

The law as thus promulgated has down the decades remained the law of the land. The Congress has in respect to newly-ceded territory been allowed a zone of tolerance for "temporary expedients." It has been permitted an area of discretion in the "adaptation" of the laws of the United States to cultures and conditions which were never in contemplation. In the realm of device and procedure, leeway has been the rule; but it has remained settled law that in the government of a territory the Congress cannot exercise a power withheld by the people. "The status", says Mr. Justice White, in *Downes* v. *Bidwell, supra,* 790, "of a particular territory has to be taken into view when the applicability of any provision of the Constitution is questioned;" but, following Mr. Chief Justice Taney, he insists that "when the Constitution has absolutely withheld from the government all power" no such inquiry is necessary. He

holds that "there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but are an absolute denial of all authority under all circumstances." Here he distinguishes clearly between "the two characters" of restrictions—those which "regulate a granted power" and those which "withdraw all authority on a particular subject." Thus he sharply separates the power to prescribe "needful rules and regulations" from the "absolute withdrawal of power which the Constitution has made in favor of human liberty."

In respect to the fundamental rights represented by the verbal shorthand of "life, liberty and property", Mr. Justice White is in no doubt. The prohibition against their invasion "is not confined to the states . . . but extends to the whole territory" over which the Congress has power to legislate. "In possession of these rights the citizens of a territory are on the same footing as citizens of the states." In respect to these liberties "there is a total absence of power everywhere within the dominion of the United States"; and the Constitution guards the people of a territory "as firmly and plainly" against "any inroads which the general government might attempt under the plea of implied powers" as the citizens of a state. As Mr. Chief Justice Fuller has summed the matter up in a dissent in *Late Corporation of the Church of Jesus Christ of Latter Day Saints* v. *U. S.*, 136 U. S. 1 10 S. Ct. 792—a statement quite in accord with the opinion of the court—it is of "vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated and not inherent and is therefore limited."

The courts have been insistent that to strike down such a denial of the liberties of men, as is presented by the accused section, there is no need to recite chapter and verse.

These are, as Mr. Justice White well puts it in *Downes* v. *Bidwell, supra*, "inherent although unexpressed principles which are the basis of all free government" which "cannot be with impunity transcended". Even in cases where "there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed although not expressed in so many words". In the case of *The Late Corporation of the Church of Jesus Christ of Latter Day Saints* v. *U. S., Supra*, Mr. Justice Bradley, speaking for the Supreme Court, states that in legislating for the territories, the Congress would doubtless "be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." And the opinion insists that "these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its power, than by any express and direct application of its provisions." In *Kepner* v. *U. S.*, 195 U. S. 100 24 S. Ct. 797, Mr. Justice Day, speaking for the Supreme Court, holds that "the power of Congress to make rules and regulations for territory incorporated in or owned by the United States ... must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution". In this domain the frame of judicial reference is not only to specific provisions in our fundamental instrument of government but also to the absence of all power and to the spirit and the glorious tradition of our system of law.

4. ***The Necessity for Puerto Rico to Find a Way through Which a Decent Standard of Life May Be Maintained by Its People Provides a Practical Reason for Denying the Validity of the Accused Section.***

In passing the accused section, the Congress did not act

in the dark. A number of congressional inquiries have laid bare the plight of the Island and its people. Without exception, they have shown the tragic and insistent pressure of population on limited resources. Crowd the people of all the world into the Continental United States and the population density is hardly any greater. Subtract our timber, our minerals and our fuel and power resources and the environment becomes comparable. The incidence of this density in malnutrition, lack of adequate housing, denial of educational facilities, the prevalence of disease is a matter of common knowledge. Puerto Rico is fighting gallantly against poverty, stunted lives and the evils which attend them. The Congress, lapsing from the sense of responsibility which usually it has acceded the Island, seeks to close the door to opportunity.

The issue before this Court is a matter of life and death to Puerto Rico. Its economy, its chance at industrial development, its capacity for advancing the standard of life of its people, hang on the decision presently to be made. The Government of Puerto Rico can say in all sincerity that here is as serious a matter as could come before a court of justice. For the issues reach far beyond the immediate question presented by the accused section of the Act. They involve alike the political status of Puerto Rico, the position of that territory in our federal system, and the relation of the insular to our national economy.

For if it should be held by this Court that the Congress has the power to fix a maximum for the number of tons of direct-consumption sugar which refiners in Puerto Rico may market in the Continental United States, it follows as of course that the Congress has the power completely to exclude sugar refined in Puerto Rico from the mainland market. If such an unrestricted power belongs to it, the Congress has adequate authority to decree the amounts of rum, plywood, textiles, chinaware, glass bottles, furniture and soap of island fabrication which can be marketed upon

the mainland. And if the Congress may fix maxima in respect to each of these and all other fabricated or processed goods, it possesses the power, at its pleasure, to exclude any or even all articles of merchandise produced in Puerto Rico from the mainland market. The rights and liberties at stake are not limited to the Puerto Rican refiners and their employees. The Government of Puerto Rico is under an obligation by encouraging manufactures, to afford opportunities for employment to masses of its citizens. The capacity of its agricultural resources to care for its population has been rather fully exploited. Its only chance at salvation lies in the fabrication of goods for mainland markets. The threat of the new Colonial system hangs over it more heavily than the pressures of the Old Colonial System upon the people of the North American Colonies. For in 1776, the frontier beckoned, and a wide open continent was there to relieve the pressures of British policy. Its population density allows to the people of Puerto Rico no escape save through the development of processing industries. To find the power of the Congress in question to be lawful is to deliver the liberties of the people, their industrial opportunities and the economy of Puerto Rico into the political control of the Congress.

The threat of imposing a Colonial status upon Puerto Rico is the more ominous because it is without political weapons with which to defend itself. It has no access to the political process for the redress of its grievances. Although its citizens are citizens of the United States, only local suffrage has been extended to Puerto Rico. Its people elect their Governor, their officials, the members of the two houses of their legislature. But the acts of its legislature are subject to presidential veto and to the revision or the annulment of the Congress. The Island is represented in the Congress by a single Resident Commissioner,

who sits in the House of Representatives, participates in discussions, but has no vote. Accordingly, the issue presented by the accused section is not a political question; and *Massachusetts* v. *Mellon*, 262 U. S. 447 43 S. Ct. 597, can here have no application. Against the doom of consignment to a colonial status, the people of Puerto Rico have no defense except to ask judicial protection of the rights and liberties guaranteed to them by the Constitution. If this Court fails them, there is no other way to salvation.[133]

The question presented here is simple and clean-cut. Has the Congress the power to convert Puerto Rico into a plantation, to limit its industry to the production of raw materials, to exclude it from all processing and manufacture for mainland consumption? Has the Congress the power to abridge the rights and liberties of citizens of the United States living and doing business in Puerto Rico in order that it may confer special privileges upon a favored group of citizens of the United States who live and do business on the mainland? Has the Congress the power to impose upon Puerto Rico, its economy, and its citizens, the iron fetters of the Old Colonial System? As Mr. Chief Justice White was in the habit of putting it, "to ask the question is to answer it."

VII. CONCLUSION.

Section 207(b) of the Act should be declared null and void as abridging the liberties of persons without due process of law, as running contrary to the intent and spirit of the Constitution, and as seeking to impose upon a group

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[133] In *U. S.* v. *Cooper Corporation*, 312 U. S. 600, 61 S. Ct. 742, the Supreme Court refused to allow the United States as a person to sue for triple damages under Section 7 of the Sherman Act; in *State of Georgia* v. *Evans*, 316 U. S. 159, 62 S. Ct. 972, a like suit was allowed to a state of the Union. The court's rationale was that other forms of action were available to the United States, and no other remedy was available to the State of Georgia.

of citizens of the United States a permanent colonial status.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

April Term, 1948

No. 9769

CENTRAL ROIG REFINING COMPANY and
WESTERN SUGAR REFINING COMPANY,
Appellants,

vs.

SECRETARY OF AGRICULTURE,
Appellee;

PORTO RICAN AMERICAN SUGAR REFINERY, INC., and
THE AMERICAN SUGAR REFINING COMPANY, et al.,
Intervenors.

Before: Clark, Prettyman and Proctor, JJ.

ORDER

On consideration of the motion of the Government of Puerto Rico for leave to intervene in the above entitled case and of the answer thereto filed by Intervenors The American Sugar Refining Company, et al., and of appellants' reply to said answer, and of the reply of the Government of Puerto Rico to said answer, It is

ORDERED by the Court that the Government of Puerto Rico be, and it is hereby allowed to intervene in the above entitled case.

PER CURIAM.

Dated June 9, 1948.

APPENDIX "B"

Puerto Rico's Right to Maintain This Action

It has been shown in the text above that the Government of Puerto Rico has a vital interest in this case; that this interest cannot adequately be represented by any other party to the proceeding; that it will, whether a party or not, be bound by the decision presently to be reached; that the Department of Justice here represents an adverse party; and that the destiny of its people and the insular economy turns upon the fate of its prayer for relief. There seem to be no cases directly in point. It remains, therefore, to survey the case-law, relevant and not so relevant, to make it clear that there is no legal authority which may be invoked to deny to the Government of Puerto Rico status in the instant case.

1. *The Government of Puerto Rico will be bound by, and hence as parens patriae is entitled to maintain this action, to protect its people against the economic pattern which the accused section threatens to impose.*

The substantial interest of the Government of Puerto Rico and of its people in the instant case has been set forth in detail above. The power to enact the accused section is the power to impose a colonial status upon the island for the benefit of the manufacturing interest on the continent: Surely an interest so vital is not, with no recourse to the courts, at the mercy of the Congress.

The case of *Massachusetts* v. *Mellon*, 262 U. S. 447, 43 S. Ct. 597, gives no support to a denial to the Government of Puerto Rico as *parens patriae* the right to maintain this action. In that case Massachusetts was challenging an act of the Congress conferring grants, among other things for maternity care, upon the several states of the union—provided the contributions were matched—as lying beyond the spending power of the Congress. The court held that Massachusetts might at its pleasure, accept or reject the contribution; was in nowise injured or damaged; and had no basis upon which to sustain a cause of action.

In the instant case no issue has been raised about the spending power of Congress. There is not even a potential issue over the spending power of the Congress; for if, under the Act, any bounties are paid, they are not paid to the Government of Puerto Rico. But, even if we distort *Massachusetts* v. *Mellon* by making its doctrine applicable to the benefits which the people of a state or territory receive because of the pattern of order imposed upon the raw sugar industry, still its holding is not in point. For the Government of Puerto Rico has at length contended above that Section 207(h) is not an essential and necessary part of the Act, but a piece of special

legislation, imposing a gross discrimination upon the citizens of the island for the benefit of the sugar refiners on the mainland.

To hold that the Act must be treated as an entity is to foreclose the questions which it is the very purpose of this case to answer. The suit of the State of Massachusetts was dismissed as involving a political question. In respect to federal legislation Massachusetts and its people had full and unimpaired access to the political process. A "political question" is in the instant case without meaning; Puerto Rico and its people, in respect to federal legislation, have no access to a political process. In this connection may we ask the Court to list for itself all the hypotheses which must be accepted to make *Massachussets* v. *Mellon* the governing authority in respect to the motion of the Government of Puerto Rico for leave to intervene.

The governing case on *parens patriae* is the *State of Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439, 65 Sup. Ct. 716, reh. den. 324 U. S. 890, 65 S. Ct. 1018. In that case the State of Georgia in behalf of itself and its people, was permitted a cause of action *parens patriae* to protect its state economy against the impact of a system of freight rates imposed by an unlawful combination of carriers. The suit there was against a group of corporations; here it is against the Secretary. Such a difference is of academic interest only; for, if it be argued that the State of Georgia case does not go so far as to authorize a suit against the Secretary, the answer is that in fact the Government of Puerto Rico has instituted no such suit. It intervened in the Court below, in an action already brought, to safeguard its own interests and those of its people. The evils complained of, and the questions raised, in this action and in the *State of Georgia* case are almost identical; and the right of an agency of state to sue in behalf of its people is put beyond doubt. Such a right of suit *parens patriae* rests upon old and established law as attested by the citations in *Georgia* v. *Pennsylvania R.R.* See also *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 27 S. Ct. 618. Nor is there merit in the contention that in respect to economic discrimination the source of which lies outside the territory, the proper agency to assume the role of *parens patriae* is the federal, not the local government. That argument was strongly pressed in *Georgia* v. *Pennsylvania R.R.*, and was there adjudged to be wanting in merit.

2. *Puerto Rico is an organized territory of the United States; and an analogue of the insular to a municipal government cannot deny to it the right to maintain this action.*

Here the argument which would deny to Puerto Rico the right to maintain this action rests upon the proposition that the creature cannot go to law against the creator; that the Government of Puerto Rico, having been established by Act of Congress, cannot bring—and presumably cannot become a party to—a suit against the United

States. In technical terms it can be answered that the suit is not against the United States, but against the Secretary to prevent him from enforcing a provision of a federal statute challenged as invalid. On that level the argument all but answers itself. For in *Franklin Township* v. *Tugwell*, 85 F. (2d) 208, 211, it is held that an agency of government, even of the minor rank of a municipality, could challenge as unconstitutional a federal statute through maintaining a suit against officials of the United States. On the substantive level, it is admitted that now and then, such a line about creature and creator is to be found in the federal reports. But it is invariably recited as a dictum, usually in an opinion as remote from the instant case as is *Coleman* v. *Miller*, 307 U. S. 433, 59 S. Ct. 972. Such an argument often put forward has never been accorded recognition. If it were valid, the original thirteen states which united to form the Union would have rights superior to those of the other thirty-five states which are creatures of the United States.

The analogy, by which the United States becomes a state and Puerto Rico a municipality within it is too forced and too far-fetched to deserve serious consideration. That Puerto Rico has not been admitted to the Union goes without saying; that its status is that of a municipality has no support in fact and little in judicial opinion. The exact position of Puerto Rico in the political system known as the United States of America involves an inquiry, much too complex and with far too many facets to be explored short of a comprehensive study. In respect to its status, two outstanding considerations have been recited in the text above. The one is that, in fact, the Government of Puerto Rico exercises powers in general superior to those of a state government. This is necessarily so; for its distance from the continent, its different cultural tradition, its larger concentration of political authority and the density of its population call for the performance by the insular government of many functions which for the several states are performed by the federal government. In this connection note, for example, insular control over public lands, taxation and shaping the pattern of the domestic economy. The other is that the status of Puerto Rico has never been at rest. The Organic Act decreed by Congress takes the place of a State Constitution. This Organic Act has been many times amended always towards elevating the status of Puerto Rico. If the right to maintain this action turns upon whether Puerto Rico is more a state or a municipality, the question can have but one answer. The Government of Puerto Rico, among its other obligations, must secure to its people the liberties to which they are entitled as citizens of the United States.

The cases which might be invoked to support the contention that the Government of Puerto Rico cannot maintain this action in its governmental capacity are none too relevant. The great bulk of them have to do with the power of a municipality to sue a state. As such they break on the stubborn fact that Puerto Rico is not a mu-

nicipality. They are likewise irrelevant in that the situations they present and the questions they raise are far removed from anything before the Court in the instant case. Nor do they in general support the propositions for which they might be cited. For example, in *City of New York* v. *N. Y. Tel. Co.*, 261 U. S. 312, 43 S. Ct. 372 and *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219, 40 S. Ct. 511, the United States Supreme Court refused intervention to the City of New York on the ground that the duty of protecting the very interest which the City of New York wished to represent had been delegated by the State legislature to the New York Public Service Commission. In like manner in *Gross* v. *Missouri and A. Ry. Co.*, 74 F. Supp. 242, when the City of Eureka Springs, Arkansas, sought to intervene, the Court pointed out that the State of Arkansas had already taken that function upon itself. In *Pennsylvania* v. *Williams*, 294 U. S. 176, 55 S. Ct. 380, intervention was allowed to the agency of state which possessed the superior obligation to protect the interest for which intervention was sought. There is, of course, variance in the cases as to whether, in case of conflict, the State or the municipality has the superior obligation in respect to the interest at stake, and therefore is to be preferred as a suitor. But no case has been discovered in which a governmental agency, within whose dominion the protection of the interest lies, has been adjudged not to have the right to maintain an action. In fact the usual reason for the denial of the right to action is that the task of protection has been formerly entrusted to some other agency of State. In respect to the matter in question here there is no competitive agency of State seeking to represent the interests of the Government and the People of Puerto Rico.

The interests of the Government of Puerto Rico and its people cannot adequately be represented by any other party in interest in the three cases. Here see *Wolpe* v. *Poretsky*, 144 F. (2d) 505, cert. den. 323 U. S. 777, 65 S. Ct. 190; *Central Trust Co. of New York* v. *Chicago R.I. and P.R. Co.*, 218 Fed. 336; *United States* v. *C. M. Lane Lifeboat Co.*, 25 F. Supp. 410. On the legitimate limits of intervention see *U. S.* v. *Terminal Railroad Assn. of St. Louis, et al.*, 236 U. S. 194, 35 S. Ct. 408; *Evens and Howard Fire Brick Company and Union Sand and Material Company* v. *U. S.*, 236 U. S. 210, 35 S. Ct. 415.

In a word, if the Government of Puerto Rico has no right to maintain this action, the interests which it seeks to protect are left entirely without representation.

APPENDIX "C"

Relevant Sections of the Sugar Act of 1948. (U.S.C., title 7, §§ 1100-1160).

AN ACT

To regulate commerce among the several States, with the Territories and possessions of the United States, and with foreign countries; to protect the welfare of consumers of sugars and of those engaged in the domestic sugar-producing industry; to promote the export trade of the United States; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Sugar Act of 1948".

TITLE I—DEFINITIONS

SEC. 101. For the purposes of this Act, except title V—

(a) The term "person" means an individual, partnership, corporation, or association.

(b) The term "sugars" means any grade or type of saccharine product derived from sugarcane or sugar beets, which contains sucrose, dextrose, or levulose.

(c) The term "sugar" means raw sugar or direct-consumption sugar.

(d) The term "raw sugar" means any sugars which are principally of crystalline structure and which are to be further refined or improved in quality, and any sugars which are principally not of crystalline structure, but which are to be further refined or otherwise improved in quality to produce any sugars principally of crystalline structure.

e) The term "direct-consumption sugar" means any sugars which are principally of crystalline structure and which are not to be further refined or otherwise improved in quality.

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(h) The "raw value" of any quantity of sugars means its equivalent in terms of ordinary commercial raw sugar testing ninety-six sugar degrees by the polariscope, determined in accordance with regulations to be issued by the Secretary. The principal grades and types of sugar and liquid sugar shall be translated into terms of raw value in the following manner:

(1) For direct-consumption sugar, derived from sugar beets and testing ninety-two or more sugar degrees by the poraliscope, by multiplying the number of pounds thereof by 1.07;

(2) For sugar, derived from sugarcane and testing ninety-two

sugar degrees by the polariscope, by multiplying the number of pounds thereof by 0.93;

(3) For sugar, derived from sugarcane and testing more than ninety-two sugar degrees by the polariscope, by multiplying the number of pounds thereof by the figure obtained by adding to 0.93 the result of multiplying 0.0175 by the number of degrees and fractions of a degree of polarization above ninety-two degrees;

(4) For sugar and liquid sugar, testing less than ninety-two sugar degrees by the polariscope, by dividing the number of pounds of the "total sugar content" thereof by 0.972.

(5) The Secretary may establish rates for translating sugar and liquid sugar into terms of raw value for (a) any grade or type of sugar or liquid sugar not provided for in the foregoing and (b) any special grade or type of sugar or liquid sugar for which he determines that the raw value cannot be measured adequately under the provisions of paragraph (1) to (4), inclusive, of this subsection (h).

(i) The term "total sugar content" means the sum of the sucrose (Clerget) and reducing or invert sugars contained in any grade or type of sugar or liquid sugar.

(j) the term "quota", depending upon the context, means (1) that quantity of sugar or liquid sugar which may be brought or imported into the continental United States, for consumption therein, during any calendar year, from the Territory of Hawaii, Puerto Rico, the Virgin Islands, or a foreign country or group of foreign countries; (2) that quantity of sugar or liquid sugar produced from sugar beets or sugarcane grown in the continental United States which, during any calendar year, may be shipped, transported, or marketed in interstate commerce, or in competition with sugar or liquid sugar shipped, transported, or marketed in interstate or foreign commerce; or (3) that quantity of sugar or liquid sugar which may be marketed in the Territory of Hawaii or in Puerto Rico, for consumption therein, during any calendar year.

(k) The term "producer" means a person who is the legal owner, at the time of harvest or abandonment, of a portion or all of a crop of sugar beets or sugarcane grown on a farm for the extraction of sugar or liquid sugar.

(l) The terms "including" and "include" shall not be deemed to exclude anything not mentioned but otherwise within the meaning of the term defined.

(m) The term "Secretary" means the Secretary of Agriculture.

TITLE II—QUOTA PROVISIONS

SEC. 201. The Secretary shall determine for each calendar year, beginning with the calendar year 1948, the amount of sugar needed to meet the requirements of consumers in the continental United States; such determinations shall be made during the month of December in each year for the succeeding calendar year (in the

case of the calendar year 1948, during the first ten days thereof) and at such other times during such calendar year as the Secretary may deem necessary to meet such requirements. In making such determinations the Secretary shall use as a basis the quantity of direct-consumption sugar distributed for consumption, as indicated by official statistics of the Department of Agriculture, during the twelve-month period ending October 31 next preceding the calendar year for which the determination is being made, and shall make allowances for a deficiency or surplus in inventories of sugar, and for changes in consumption because of changes in population and demand conditions, as computed from statistics published by agencies of the Federal Government; and, in order that such determinations shall be made so as to protect the welfare of consumers and of those engaged in the domestic sugar industry by providing such supply of sugar as will be consumed at prices which will not be excessive to consumers and which will fairly and equitably maintain and protect the welfare of the domestic sugar industry, the Secretary, in making any such determination, in addition to the consumption, inventory, population, and demand factors above specified and the level and trend of consumer purchasing power, shall take into consideration the relationship between the prices at wholesale for refined sugar that would result from such determination and the general cost of living in the United States as compared with the relationship between prices at wholesale for refined sugar and the general cost of living in the United States obtaining during 1947 prior to the termination of price control of sugar as indicated by the Consumers' Price Index as published by the Bureau of Labor Statistics of the Department of Labor.

SEC. 202. Whenever a determination is made, pursuant to section 201, of the amount of sugar needed to meet the requirements of consumers, the Secretary shall establish quotas, or revise existing quotas—

(a) For domestic sugar-producing areas, by apportioning among such areas 4,268,000 short tons, raw value, as follows:

Area	Short tons, raw value
Domestic beet sugar	1,800,000
Mainland cane sugar	500,000
Hawaii	1,052,000
Puerto Rico	910,000
Virgin Islands	6,000

(b) For the Republic of the Philippines, in the amount of nine hundred and fifty-two thousand short tons of sugar as specified in section 211 of the Philippine Trade Act of 1946.

(c) For foreign countries other than the Republic of the Philippines, by prorating among such areas an amount of sugar, raw value, equal to the amount determined pursuant to section 201 less

the sum of the quotas established pursuant to subsections (a) and (b) of this section, on the following basis:

Area	Per centum
Cuba	98.64
Foreign countries other than Cuba and the Republic of the Philippines	1.36

The quota for foreign countries other than Cuba and the Republic of the Philippines shall be prorated among such countries on the basis of the division of the quota for such countries made in General Sugar Quota Regulations, Series 4, Number 1, issued December 12, 1936, pursuant to the Agricultural Adjustment Act, as amended.

(d) Notwithstanding the other provisions of this title II, in the event the quota established for Cuba, including any and all deficits allotted or prorated to Cuba pursuant to the provisions of section 204 (a), shall be a smaller proportion of the total amount of sugar which the Secretary determines is needed to meet the requirements of consumers in the continental United States pursuant to section 201 of this Act, than the quota which would have been established for Cuba upon such consumptive estimate under the provisions of section 202 (b) of the Sugar Act of 1937, the quotas for domestic sugar-producing areas established pursuant to the other provisions of this title II shall be reduced pro rata by such amounts as are required to establish such quota for Cuba and the amounts by which such domestic sugar-producing quotas are so reduced shall be added to the quota for Cuba.

(e) If the Secretary of State finds that any foreign country denies fair and equitable treatment to the nationals of the United States, its commerce, navigation, or industry, and so notifies the Secretary, the Secretary shall have authority to withhold or withdraw any increase in the share of the domestic consumption requirements provided for such country by this Act as compared with the share allowed under section 202 (b) of the Sugar Act of 1937: *Provided*, That any amount of sugar so withheld or withdrawn shall be prorated to domestic areas on the basis of existing quotas for such areas and the Secretary shall revise such quotas accordingly: *Provided further*, That any portion of such amount of sugar which cannot be supplied by domestic areas may be prorated to foreign countries other than a country which the Secretary of State finds has denied fair and equitable treatment to nationals of the United States.

SEC. 203. In accordance with such provisions of section 201 as he deems applicable, the Secretary shall also determine the amount of sugar needed to meet the requirements of consumers in the Territory of Hawaii, and in Puerto Rico, and shall establish quotas for the amounts of sugar which may be marketed for local consumption in such areas equal to the amounts determined to be needed to meet the requirements of consumers therein.

SEC. 204. (a) The Secretary shall, from time to time during the calendar year, determine whether, in view of the current inventories of sugar, the estimated production from the acreage of sugarcane or sugar beets planted, the normal marketings within a calendar year of new-crop sugar, and other pertinent factors, any domestic area, the Republic of the Philippines, or Cuba, will be unable to market the quota for such area. If the Secretary finds that any domestic area or Cuba will be unable to market the quota for such area for the calendar year then current, he shall revise the quotas for the domestic areas and Cuba by prorating an amount of sugar equal to the deficit so determined to the other such areas on the basis of the quotas then in effect: *Provided, however*, That domestic areas shall not share in any deficit of any domestic area if the then outstanding determination of the Secretary made pursuant to section 201 of the Act is less than seven million short tons, raw value. If the Secretary finds that the Republic of the Philippines will be unable to market the quota for such area for the calendar year then current, he shall revise the quotas for Cuba and foreign countries other than Cuba and the Republic of the Philippines by prorating an amount of sugar equal to the deficit so determined, as follows:

To Cuba	95 per centum
To foreign countries other than Cuba and the Republic of the Philippines	5 per centum

Provided, however, That whenever the quota for Cuba established under the provisions of this Act other than section 202 (d) is less than the amount required by the provisions of section 202 (d) of this Act, such prorations shall be as follows:

To Cuba	98.64 per centum
To foreign countries other than Cuba and the Republic of the Philippines	1.36 per centum

Any portion of such Philippine deficit which the Secretary determines cannot be supplied by Cuba shall be prorated to foreign countries other than Cuba and the Republic of the Philippines. No part of any Philippine deficit so prorated may be filled by direct-consumption sugar.

(b) If, on the 1st day of September in any calendar year, any part or all of the proration to any foreign country of the quota for foreign countries other than Cuba and the Republic of the Philippines established under the provisions of section 202 (c) has not been filled, the Secretary may revise the proration of such quota among such foreign countries by allotting an amount of sugar equal to such unfilled proration to such foreign countries as have filled their prorations of such quota by such date.

(c) The quota for any domestic area, the Republic of the Philippines, Cuba, or other foreign countries as established under the

provisions of section 202 shall not be reduced by reason of any determination of a deficit existing in any calendar year under the provisions of subsections (a) and (b) of this section 204.

(d) Any proration among foreign countries other than Cuba and the Republic of the Philippines pursuant to this section shall be on such basis as the Secretary shall determine.

SEC. 205. (a) Whenever the Secretary finds that the allotment of any quota, or proration thereof, established for any area pursuant to the provisions of this Act, is necessary to assure an orderly and adequate flow of sugar or liquid sugar in the channels of interstate or foreign commerce, or to prevent disorderly marketing or importation of sugar or liquid sugar, or to maintain a continuous and stable supply of sugar or liquid sugar, or to afford all interested persons an equitable opportunity to market sugar or liquid sugar within any area's quota, after such hearing and upon such notice as he may by regulations prescribe, he shall make allotments of such quota or proration thereof by allotting to persons who market or import sugar or liquid sugar, for such periods as he may designate, the quantities of sugar or liquid sugar which each such person may market in continental United States, the Territory of Hawaii, or Puerto Rico, or may import or bring into continental United States for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him. The Secretary may also, upon such hearing and notice as he may by regulations prescribe, revise or amend any such allotment upon the same basis as the initial allotment was made.

(b) An appeal may be taken, in the manner hereinafter provided, from any decision making such allotments, or revisions thereof, to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for an allotment whose application shall have been denied.

(2) By any person aggrieved by reason of any decision of the Secretary granting or revising any allotment made to him.

(c) Such appeal shall be taken by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Secretary. Unless a later date is specified by the Secretary as part of his decision, the decision complained of shall be considered to be effective as of the date on which public

announcement of the decision is made at the office of the Secretary in the city of Washington. The Secretary shall thereupon, and in any event not later than ten days from the date of such service upon him, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Secretary to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of appellants' reasons for said appeal at the office of the Secretary in the city of Washington. Within thirty days after the filing of said appeal the Secretary shall file with the court the originals or certified copies of all papers and evidence presented to him upon the hearing involved, a like copy of his decision thereon, a full statement in writing of the facts and grounds for his decisions as found and given by him and a list of all interested persons to whom he has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party together with proof of service of true copies of said notice and statement, both upon the appellant and upon the Secretary. Any person who would be aggrieved or whose interests would be adversely affected by reversal or modification of the decision of the Secretary complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision, and if it enters an order reversing the decision of the Secretary it shall remand the case to the Secretary to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Secretary are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States, upon writ of certiorari on petition therefor, under section 240 of the Judicial Code, as amended (U. S. C., title 28, sec. 347), by appellant, by the Secretary, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and other interested parties intervening in said appeal, but not against the Secretary, depending upon the nature of the issues involved in such appeal and the outcome thereof.

SEC. 206. Subject to the provisions of sections 207 and 408 relating to the suspension of quotas, sugar quotas shall be established

pursuant to this Act for the calendar year 1948 within ten days after effective date of this Act.

SEC. 207. (a) Not more than twenty-nine thousand six hundred and sixteen short tons, raw value, of the quota for Hawaii for any calendar year may be filled by direct-consumption sugar.

(b) Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar.

(c) None of the quota for the Virgin Islands for any calendar year may be filled by direct-consumption sugar.

(d) Not more than fifty-six thousand short tons of sugar of the quota for the Republic of the Philippines for any calendar year may be filled by direct-consumption sugar as specified in section 211 of the Philippine Trade Act of 1946.

(e) Not more than three hundred and seventy-five thousand short tons, raw value, of the quota for Cuba for any calendar year may be filled by direct-consumption sugar.

(f) This section shall not apply with respect to the quotas established under section 203 for marketing for local consumption in Hawaii and Puerto Rico.

(g) The direct-consumption portions of the quotas established pursuant to this section, and the enforcement provisions of title II applicable thereto, shall continue in effect and shall not be subject to suspension pursuant to the provisions of section 408 of this Act unless the President acting thereunder specifically finds and proclaims that a national economic or other emergency exists with respect to sugar or liquid sugar which requires the suspension of direct-consumption portions of the quotas.

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SEC. 209. All persons are hereby prohibited—

(a) From bringing or importing into the continental United States from the Territory of Hawaii, Puerto Rico, the Virgin Islands, or foreign countries, (1) any sugar or liquid sugar after the applicable quota, or the proration of any such quota, has been filled, or (2) any direct-consumption sugar after the direct-consumption portion of any such quota has been filled;

(b) From shipping, transporting, or marketing in interstate commerce, or in competition with sugar or liquid sugar shipped, transported, or marketed in interstate or foreign commerce, any sugar or liquid sugar produced from sugar beets or sugarcane grown in either the domestic-beet-sugar area or the mainland cane-sugar area after the quota for such area has been filled;

(c) From marketing in either the Territory of Hawaii or Puerto Rico, for consumption therein, any sugar or liquid sugar after the quota therefor has been filled;

(d) From exceeding allotments of any quota, direct-consumption portion of any quota, or proration of any quota, made to them pursuant to the provisions of this Act.

SEC. 210. (a) The determinations provided for in sections 201 and 203, and all quotas, prorations, and allotments, except quotas established pursuant to the provisions of section 208, shall be made or established in terms of raw value.

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SEC. 211. • • • • •

(c) The quota established for any domestic sugar-producing area may be filled only with sugar or liquid sugar produced from sugar beets or sugarcane grown in such area: *Provided, however,* That any sugar or liquid sugar admitted free of duty from the Virgin Islands under the Act of Congress, approved March 3, 1917 (39 Stat. 1133), may be admitted within the quota for the Virgin Islands.

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TITLE III—CONDITIONAL-PAYMENT PROVISIONS

SEC. 301. The Secretary is authorized to make payments on the following conditions with respect to sugar or liquid sugar commercially recoverable from the sugar beets or sugarcane grown on a farm for the extraction of sugar or liquid sugar:

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(b) That there shall not have been marketed (or processed) an amount (in terms of planted acreage, weight, or recoverable sugar content) of sugar beets or sugarcane grown on the farm and used for the production of sugar or liquid sugar to be marketed in, or so as to compete with or otherwise directly affect interstate or foreign commerce, in excess of the proportionate share for the farm, as determined by the Secretary, pursuant to the provisions of section 302, of the total quantity of sugar beets or sugarcane required to be processed to enable the area in which such sugar beets or sugarcane are produced to meet the quota (and provide a normal carry-over inventory) as estimated by the Secretary for such area for the calendar year during which the larger part of the sugar or liquid sugar from such crop normally would be marketed.

(c) (1) That all persons employed on the farm in the production, cultivation, or harvesting of sugar beets or sugarcane with respect to which an application for payment is made shall have been paid in full for all such work, and shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing; and in making such determinations the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended, and the differences in conditions among various producing areas: *Provided, however,* That a payment which would be payable except for the foregoing provisions of this sub-

paragraph may be made, as the Secretary may determine, in such manner that the laborer will receive an amount, insofar as such payment will suffice, equal to the amount of the accrued unpaid wages for such work, and that the producer will receive the remainder, if any, of such payment.

(2) That the producer on the farm who is also, directly or indirectly a processor of sugar beets or sugarcane, as may be determined by the Secretary shall have paid, or contracted to pay under either purchase or toll agreements, for any sugar beets or sugarcane grown by other producers and processed by him at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing.

SEC. 302. (a) The amount of sugar or liquid sugar with respect to which payment may be made shall be the amount of sugar or liquid sugar commercially recoverable, as determined by the Secretary, from the sugar beets or sugarcane grown on the farm and marketed (or processed by the producer) not in excess of the proportionate share for the farm, as determined by the Secretary, of the quantity of sugar beets or sugarcane for the extraction of sugar or liquid sugar required to be processed to enable the producing area in which the crop of sugar beets or sugarcane is grown to meet the quota (and provide a normal carry-over inventory) estimated by the Secretary for such area for the calendar year during which the larger part of the sugar or liquid sugar from such crop normally would be marketed.

(b) In determining the proportionate shares with respect to a farm, the Secretary may take into consideration the past production on the farm of sugar beets and sugarcane marketed (or processed) for the extraction of sugar or liquid sugar and the ability to produce such sugar beets or sugarcane, and the Secretary shall, insofar as practicable, protect the interests of new producers and small producers and the interests of producers who are cash tenants, share tenants, adherent planters, or share croppers.

(c) Payments shall be effective with respect to sugar or liquid sugar commercially recoverable from sugar beets and sugarcane grown on a farm commencing with the crop year 1948.

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SEC. 307. This title shall apply to the continental United States, the Territory of Hawaii, Puerto Rico, and the Virgin Islands.

TITLE IV—GENERAL PROVISIONS

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SEC. 404. The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, the provisions of this Act or of any order or regulation made or issued pursuant to this

Act. If and when the Secretary shall so request, it shall be the duty of the several district attorneys of the United States, in their respective districts, to institute proceedings to enforce the remedies and to collect the penalties and forfeitures provided for in this Act. The remedies provided for in this Act shall be in addition to, and not exclusive of, any of the remedies or penalties existing at law or in equity.

SEC. 405. Any person who knowingly violates, or attempts to violate, or who knowingly participates or aids in the violation of, any of the provisions of section 209, or any person who brings or imports into the continental United States direct-consumption sugar after the quantities specified in section 207 have been filled, shall forfeit to the United States the sum equal to three times the market value, at the time of the commission of any such act, (a) of that quantity of sugar or liquid sugar by which any quota, proration, or allotment is exceeded, or (b) of that quantity brought or imported into the continental United States after the quantities specified in section 207 have been filled, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

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SEC. 408. Whenever pursuant to the provisions of this Act the President finds and proclaims that a national economic or other emergency exists with respect to sugar or liquid sugar, he shall by proclamation suspend the operation, except as provided in section 207 of this Act, of all the provisions of title II above, and, thereafter, the operation of such title shall continue in suspense until the President finds and proclaims that the facts which occasioned such suspension no longer exist. The Secretary shall make such investigations and reports thereon to the President as may be necessary to aid him in carrying out the provisions of this section.

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SEC. 411. The powers vested in the Secretary under this Act shall terminate on December 31, 1952, except that the Secretary shall have power to make payments under title III under programs applicable to the crop year 1952 and previous crop years.

SEC. 412. The provisions of this Act, except where an earlier effective date is provided for herein, shall become effective January 1, 1948. As provided in section 513 of the Sugar Act of 1937, the powers vested in the Secretary under that Act shall terminate on December 31, 1947, except that the Secretary shall have power to make payments under title III of that Act under programs thereunder applicable to the crop year 1947 and previous crop years.

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APPENDIX "D"

Relevant Sections of Congressional Legislation Affecting Puerto Rico

Act of April 12, 1900—"First Organic Act of Puerto Rico"

Section 7—That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Puerto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Puerto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, ninteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Puerto Rico, shall constitute a body politic under the name of The People of Puerto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

Act of March 2, 1917—"Organic Act of 1917, as amended"

BILL OF RIGHTS

Section 2—That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.

That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

That no law impairing the obligation of contracts shall be enacted.

That no person shall be imprisoned for debt.

That the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, whenever during such period the necessity for such suspension shall exist.

That no *ex post facto* law or bill of attainder shall be enacted.

Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law.

Nothing contained in this Act shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees.

That no law granting a title of nobility shall be enacted, and no person holding any office or profit or trust under the Government of Puerto Rico shall, without the consent of the Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign State, or any officer thereof.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

That the right to be secure against unreasonable searches and seizures shall not be violated.

That no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

That slavery shall not exist in Puerto Rico.

That involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall not exist in Puerto Rico.

That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed, and that no political or religious test other than an oath to support the Constitution of the United States and the laws of Puerto Rico shall be required as a qualification to any office or public trust under the Government of Puerto Rico.

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(*As amended February 3, 1921*—41 Stat. 1096.)—That no public money or property shall ever be appropriated, applied, donated, used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such. Contracting of poligamous or plural marriages hereafter is prohibited.

That no money shall be paid out of the Treasury except in pur-

suance of an appropriation by law, and on warrant drawn by the proper officer in pursuance thereof.

That the rule of taxation in Puerto Rico shall be uniform.

That all money derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the Treasury and paid out for such purpose only except upon the approval of the President of the United States.

That eight hours shall constitute a day's work in all cases of employment of laborers and mechanics by and on behalf of the Government of the Island on public works, except in cases of emergency.

That the employment of children under the age of fourteen years in any occupation injurious to health or moral or hazardous to life or limb is hereby prohibited.

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Section 5—That all citizens of Puerto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes", and all natives of Puerto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States.

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Section 5a—*"New Section inserted by Act of Congress approved March 4, 1927*—44 Stat. 1418).—That all citizens of the United States who have resided or who shall hereafter reside in the island for one year shall be citizens of Puerto Rico. . . .

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Section 5b—(*New Section inserted by an Act of Congress approved June 27, 1934*).—All persons born in Puerto Rico on or after April 11, 1899 (whether before or after the effective date of this Act) and not citizens, subjects, or nationals of any foreign power, are hereby declared to be citizens of the United States; . . .

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Section 5c—(*New Section inserted by an Act of Congress approved May 16, 1938*).—That any person of good character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and born in Puerto Rico on or after April 11, 1899, who has continued to reside within the jurisdiction of the United States whose father elected on or before April 11, 1900, to preserve his allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain entered into on April 11, 1899, and who, by reason of misinformation regarding his or her own citizenship status failed within the time limits prescribed by

Section 5 or Section 5a hereof to exercise the privilege of establishing United States citizenship and has heretofore erroneously but in good faith exercised the rights and privileges and performed the duties of a citizen of the United States, and has not personally sworn allegiance to any foreign government or ruler upon or after attainment of majority, may make a sworn declaration of allegiance to the United States before any United States district court. Such declaration shall set forth facts concerning his or her birth in Puerto Rico, good character, attachment to the principles of the Constitution of the United States, and being well disposed to the good order and happiness of the United States, residence within the jurisdiction of the United States, and misinformation regarding United States citizenship status, and shall be accompanied by proof thereof satisfactory to the court. After making such declaration and submitting such proofs, such person shall be admitted to take the oath of allegiance before the court, and thereupon shall be considered a citizen of the United States.

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Section 9—That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Purto Rico as in the United States, except the internal revenue laws: . . .

Act of August 5, 1947, "Elective Governor Act":

Section 7. Section 2 of said Organic Act (48 U. S. C., sec. 737), is amended by adding at the end thereof the following new paragraph:

"The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States."

Act of April 12, 1900, c. 191, §3, 31 Stat. 77:

"All merchandise and articles coming into the United States from Puerto Rico and coming into Puerto Rico from the United States shall be entered at the several ports of entry free of duty and in no event shall any tariff duties be collected on said merchandise or articles."

Act of March 2, 1917, c. 145, §3, 39 Stat. 953; February 3, 1821, c. 34, §2, 41 Stat. 1096:

"No export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments respectively, as may be provided and defined by the legislature of Puerto Rico; and when necessary to anticipate taxes and revenues, bonds, and other obligations may be issued by Puerto Rico or any municipal government therein as may be provided by law and to protect the public credit."

Act of April 12, 1900, c. 191, §9, 1 Stat. 79:

"The coasting trade between Puerto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States."

Constitution of the United States, Paragraph 1, Section 2, Article IV. This paragraph in the Constitution reads as follows:

"The citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several states."